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Susan Tiefenbrun

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Piracy of Intellectual Property in China and the Former Soviet Union and its Effects Upon International Trade: A Comparison

SUSAN TIEFENBRUN†

To steal a book is an elegant offense.¹

No, no, it's far too obvious that the concept of intellectual property is useless. My property must be exclusively mine.²

INTRODUCTION

This Article is a comparison of two countries in transition, China and Russia, and the causes and effects of the extensive practice of intellectual property piracy. Intellectual property piracy is committed by people and government agencies in both countries in violation of comprehensive domestic intellectual property laws and binding international agreements. A comparison is, by its very nature, a complex task. It attempts to tease out the elements of a network of interwoven issues underlying a crime committed in two different countries with similar political ideologies. The causes and effects of intellectual property piracy

† This Article was presented at a symposium entitled "On The Threshold of The Asian Century: Financial Markets and Services in The Asia Pacific Region" sponsored by Hofstra University at the Frank G. Zarb School of Business for the Merrill Lynch Center for the Study of International Financial Services and Markets on April 11, 1997. I wish to give special thanks for the research assistance of Jeremy Wolk, Hofstra University School of Law, without whose precision and interest in the subject this study could not have been accomplished. I also wish to thank Professor Peter Krug of Oklahoma University School of Law who read and commented on earlier drafts of this study and who provided invaluable assistance on the section devoted to Russia.

1. Chinese Proverb.

2. Christian Sigmund Krause (1783).

are intricately connected to, and affected by, the economy of the country in which the piracy is committed, the political history and ideology of the pirating nation, the culture of the people engaged in the piracy, and the adequacy of the legal system to enforce its intellectual property laws. This Article attempts to take these complex factors into consideration in the comparison.

This Article is organized into four parts. This Introduction examines the contradictions inherent in intellectual property legislation, counterbalanced by the negative effects of U.S. efforts to combat intellectual property piracy in the global trade market. China and Russia ineffectively enforce newly enacted intellectual property legislation and anti-piracy laws, which result in sizable revenue losses for the United States. Attempting to trace the causes of piracy, this Introduction examines in more detail the current economies of China and Russia and compares their contrasting approaches to transition from a planned to a market economy.

Part I examines the history and development of China's domestic intellectual property legislation covering trademarks, patents and copyrights and its compliance with international intellectual property conventions; the causes and effects of violations of intellectual property legislation; the laws affecting trade secrets; the trade agreements affecting legislation; the extent of piracy in China; and the Chinese and U.S. attempts to combat piracy and the effect of these efforts on international trade.

Part II examines Russia: the influence of its political ideology on the history and development of domestic intellectual property legislation covering trademarks, patents, and copyrights and Russian compliance with international intellectual property conventions; the role of trade agreements in the development of new intellectual property legislation; the extent of piracy of intellectual property in Russia; Russian and U.S. attempts to combat piracy and the effects of these efforts on international trade. Part III outlines possible solutions to the piracy of intellectual property.

A. *Intellectual Property Law*

Intellectual property law is a conundrum. In theory, intellectual property law grants a limited legal monopoly to individuals as a reward for originality, as an incentive to create, and as a protection against piracy. In practice, the legal monopoly is granted less often to the starving artist who justifiably seeks remuneration for his creative endeavors, but rather to a limited number of large corporations and employers for creations that

are often transformative of original thinking and already located in the public domain.³ The system of intellectual property is both rights-oriented and utilitarian, relying on antithetical concepts of public and private domain.⁴ The paradox in intellectual property law becomes clear when one considers copyright protection. Private property copyright law enforces the owner's right to exclude others from copying the original expression of the owner's idea.⁵ On the one hand, copyright provides incentives to authors and encourages the production of more ideas and information for increased public consumption. On the other hand, copyright provides a metaphoric "fence" which keeps the public out of the private property of the author.⁶ Intellectual property law is caught up in the complex contradiction of conferring private property rights to a limited number of individuals and corporations⁷ while limiting the free flow of information and restricting its access and transmission in what seems to be an economically inefficient system.⁸

B. *Violations of Intellectual Property Laws in China and Russia*

China and Russia have transformed their old and antiquated intellectual property laws. These laws were based in socialist ideology, which is fundamentally incompatible with the principle of property ownership. Despite these laws which are designed to protect the rights of trademark, patent, and copyright owners, many people, as well as government agencies in both countries, are currently engaging in the piracy of intellectual property and detrimentally affecting international trade.

Both countries have attempted to enact anti-piracy laws, and both have failed terribly to enforce these laws. Piracy of intellectual property has resulted in lost revenues for the United States of billions of dollars each year and has affected the ability of the United States to trade effectively with these pirating countries. Total losses to the United States' economy due to intellectual property piracy continue to range from \$20 billion to

3. See JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS* (1996) (offering a full-blown attack on the justification of intellectual property laws).

4. See *id.* at 52.

5. Keith Aoki, *Intellectual Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1336 (1996).

6. See BOYLE, *supra* note 3, at 19.

7. See *id.* at Preface XIII ("The language of romantic authorship . . . is used to support sweeping intellectual property rights for large corporate entities: Sony, Pfizer, Microsoft . . . actual authors lose out . . . their work belongs to employers.").

8. See *id.*

\$40 billion annually.⁹

The United States has attempted various approaches to combat piracy of intellectual property in Russia and China. It has proposed and imposed unilateral sanctions against the Former Soviet Union and against China for unfair trade practices under Section 301 of the Trade Act of 1974.¹⁰ Section 301 reaches beyond the General Agreement on Tariffs and Trade,¹¹ as well as the World Trade Organization (WTO), to give the President of the United States unilateral power to penalize countries that threaten American economic interests. The United States has proposed and imposed Super 301 proceedings against China for violating intellectual property rights resulting in a 1995 announcement of sanctions of one hundred percent on \$1.08 billion of Chinese imports.¹² Super 301¹³ amended Section 301 of the Trade Act of 1974 in the Omnibus Trade and Competitiveness Act of 1988.¹⁴ Super 301 requires the United States Trade Representative (USTR) and its administration to provide an annual list of foreigners' "unfair" trade practices ("priority practices") that could result in sanctions.¹⁵ Special 301,¹⁶ a subset of Super 301, requires the USTR to provide an annual "priority list," as well as a "watch list," of foreigners engaging in infringement of intellectual property. The United States has also sought protection against foreign infringers of intellectual property by enacting Section 337 of the Tariff Act of 1930.¹⁷ Section 337 allows holders of U.S. intellectual property rights to obtain expedited relief from the United States International Trade Commission against imports which infringe upon these rights. The United States has also threatened non-renewal of China's Most-Favored-Nation status in order to control its piracy of in-

9. See *id.* at 121.

10. Section 301 of the Trade Act of 1974, 19 U.S.C. §§ 2411-2420 (1994) [hereinafter Section 301]. See also *infra* text accompanying notes 267-74.

11. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

12. Martha M. Hamilton, *U.S. to Hit China with Stiff Tariffs*, WASH. POST, Feb. 5, 1995, at A1.

13. Super 301 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2420 (A)(1)(a)-(b) (1994) [hereinafter Super 301]. See also *infra* text accompanying notes 275-282.

14. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 [hereinafter Trade Act of 1988].

15. See *id.*

16. Special 301 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2242(a)(1)(A) [hereinafter Special 301]. See also *infra* text accompanying notes 275-82.

17. 19 U.S.C. § 337 (1930) [hereinafter Section 337]. See also *infra* text accompanying notes 283-86.

lectual property. The United States continues to refuse to admit China into the WTO, which has its own Dispute Resolution Mechanism to combat trade distortion practices. Despite these multifaceted attempts to combat piracy of intellectual property, piracy continues to prevail in China and Russia.

C. *Economics of China and Russia, and Strategies of Transition*

Although both China and Russia were communist countries firmly rooted in a traditional Marxist/Leninist ideology, the present difference between Chinese and Russian economic performance is quite remarkable.¹⁸ Since 1979, under the leadership of Deng Xiaoping, the Chinese have gradually and sequentially adopted market reform tactics resulting in a currently booming economy.¹⁹ In contrast, Russia's similar reform movements initiated by Gorbachev during the era of *Perestroika* and *Glasnost* produced a revolution in 1991 resulting in the collapse of communism, the establishment of a fragmented Commonwealth of Independent States, and the radical adoption of market reforms and privatization that have resulted in the economic decline and demoralization of the Russian peoples.

China's transition strategy has been distinctively Asian, as it follows a model of development similar to South Korea and other neighboring Asian countries like Taiwan, Hong Kong and Singapore.²⁰ Following the example of New Industrializing Economies (NIEs), the Chinese gave farms back to the farmers, generating huge increases in productivity, income, and output, with little state investment.²¹ By encouraging the growth of rural enterprises and not focusing exclusively on the urban sector, China successfully moved workers off farms into factories.²² China's open door policy encouraged foreign investments, which created more jobs, produced gains in outputs and exports at negligible cost to the government, and linked the Chinese economy to the international market.²³ China also gave priority to light and medium industry, yielding a surge of output with lim-

18. WILLIAM H. OVERHOLT, *THE RISE OF CHINA: HOW ECONOMIC REFORM IS CREATING A NEW SUPERPOWER* 32 (1993).

19. Seth Faison, *Asia's Giant, After Detours, Takes Familiar Growth Path*, N.Y. TIMES, Mar. 4, 1997, at D1.

20. OVERHOLT, *supra* note 18, at 32.

21. *See id.* at 33.

22. Zuli Hu & Mohsin S. Kahn, *Why is China Growing So Fast?*, 8 ECON. ISSUES 1 (1997).

23. *Id.*

ited initial investment.²⁴ Like Taiwan and Hong Kong, in the 1960s and 1970s China flooded the world market with textiles, garments, shoes, toys, and consumer electronics. China became a global force in these commodities by the 1980s and 1990s which caused an explosion of growth, consumer goods production, personal income, exports, and foreign exchange earnings.²⁵

In contrast, the Soviet Union neglected agriculture, was less encouraging to foreign investment, developed its heavy industry, and was too quick to liberalize its prices which caused panic and hyperinflation.²⁶ The Soviet government, in imitation of the Chinese who began joint ventures in 1979, enacted joint venture laws which progressively permitted more control by foreign partners.²⁷ Like the Chinese, the post-Soviet government eventually permitted wholly-foreign-owned ventures.²⁸ The Russians even passed land reform laws²⁹ permitting the ownership of land by foreigners, but practical problems caused by the failure to enforce these laws and the intricacies of bureaucracy discouraged land ownership.³⁰ The Russians emphasized massive equipment imports, built more machines, used more and more machine tools, organized industry under superministries and attempted to improve the petroleum industry and reorganize the automobile and high-technology sectors.³¹ These efforts required high initial and continued capital expenditures. The result of the Soviet strategy was the collapse of production coupled with crippling inflation. Moreover, unlike China which privatized slowly, the Soviets and post-Soviets placed a premature emphasis on privatization of state enterprises which was unsuccessfully im-

24. *Id.*

25. *Id.*

26. OVERHOLT, *supra* note 18, at 32.

27. Susan W. Tiefenbrun, *Joint Ventures in the U.S.S.R., Eastern Europe, and the People's Republic of China as of December 1989*, 21 N.Y.U. J. INT'L L. & POL. 667, 679 (1989).

28. OVERHOLT, *supra* note 18, at 166.

29. William G. Frenkel, *Private Land Ownership in Russia: An Overview of Legal Developments to Date*, 3 PARKER SCH. J.E. EUR. L. 257 (1996). Progress has been achieved in the area of residential land ownership by individuals in Russia, but little progress has been made in land privatization in post-Soviet Russia with respect to agricultural and urban land. Privatization of agrarian land has met with strong resistance and resulted in a legal vacuum for the conveyance of farmland and its use. *Id.*

30. Olga Floroff & Susan W. Tiefenbrun, *Land Ownership in the Russian Federation: Laus and Obstacles*, 37 ST. LOUIS U. L.J. 235 (1993). See also Olga Floroff & Susan W. Tiefenbrun, *New Soviet Fundamentals of Law on Land Ownership*, 4 N.Y. INT'L L. REV. 93 (1991).

31. OVERHOLT, *supra* note 18, at 33.

plemented by a law adopted in June, 1992.³² Although equally unsuccessful, Russia revised its privatization program in 1994, in hopes that a new privatization program might prove to be more successful than the first.³³ As a result of all these radical unsuccessful measures, a depression resulted in Russia caused by a lack of supply rather than inadequate demand.³⁴ Russia's economy today is half the size of the Soviet Union's in its final days.³⁵ Russia has suffered five straight years of economic decline. Even though many experts predict that Russia may experience real growth in 1998, an economic boom is unlikely.³⁶

Unlike the radical approach of the Soviets, Deng Xiaoping believed in reform as a sequencing process, slow and balanced. His strategy involved a gradual exploitation of international markets, the taming of multinational corporations, the education of the Chinese people, the serving of Western markets, and the creation of competitive organizations. Deng Xiaoping focused on human resources rather than on natural resource cartels, which was the strategy of the New International Economic Order of Third World countries.³⁷

Gorbachev's strategy was more radical, and he effectuated changes all at once which ultimately produced failure.³⁸ The Soviet Union, the CIS and Eastern Europe engaged in spasmodic approaches to reform—Poland's "Big Bang," Russia's "Shock Therapy," Shatalin's bold economic plan to privatize the Soviet Union in five hundred days, to convert the ruble, and to decontrol prices (which were never actually implemented). The Soviet people resented this assault on their lifestyle and this dismantling of a formerly protective welfare system. In contrast, China remained cautious about privatization and held to the belief that price reform must be in place before privatization could be instituted.³⁹ China chose to delay privatization until it had liber-

32. See Kaj Hobér, *The 1994 Privatization Program: Has Russian Privatization Reached the Age of Aquarius?*, S.E.E.L., Apr. 1994, at 1 (citing President Yeltsin's Decree No. 2284 of Dec. 24, 1993 which provides for a new privatization program for Russia. The first privatization program was adopted on June 11, 1992. Russian privatization legislation is detailed, complex, and composed of a myriad of laws, decrees and regulations).

33. See Olga Floroff & Susan Tiefenbrun, *A Legal Framework for Soviet Privatization*, 18 PEPP. L. REV. 849 (1991).

34. OVERHOLT, *supra* note 18, at 35.

35. Sherman Garnett, *Russia's Illusory Ambitions*, FOREIGN AFF. Mar.-Apr. 1997, at 61-62.

36. See *id.* at 62.

37. OVERHOLT, *supra* note 18, at 34.

38. See *id.* at 36.

39. See *id.* at 43.

alized prices, created a national pension system, provided alternative medical and education programs, undertaken major banking reforms, and set up stock markets.⁴⁰

Deng Xiaoping had the communists and the majority of the military leadership on his side in favor of economic reform.⁴¹ Although the Communist Party Politburo and the Central Committee often approved Gorbachev's actions, Gorbachev quickly lost the support of farmers, workers, the managerial class, the military, and the Communist Party leadership, all of whom had good reason to despise the consequences of his reforms.⁴² Compounding Soviet economic and military decline are the political confusion and fragmentation which caused the government's disintegration.⁴³ Ironically, the main beneficiaries of the Soviet and post-Soviet economic reforms were the intellectuals who coveted freedom of speech, and the foreigners who reveled in the political victory of democracy over communism.

As a result of the economic breakdown and political fragmentation caused by the Soviet economic reforms of the 1990s, Russia was unable to pay its foreign debts. In contrast, China remained economically solid, unfettered by ethnic diversity. China is an ancient nation, not a new creation like the former Soviet Union. China's population is ninety-four percent Han Chinese, whereas the USSR's was less than half Russian. China avoided fragmentation and general political and economic crisis by severely cutting its military budgets and avoiding sabotage from within the Communist Party, which occurred in Poland, post-Soviet Russia and the CIS.⁴⁴ But it is important to recognize that despite the economic and social problems which exist in Russia and Eastern Europe as a result of the reforms, the economy in Poland is better today than it was under the communist regime, and Hungary and the Czech Republic are showing dramatic economic improvements since the collapse of communism.

Although the Chinese transition strategy appears to work better than Russia's or Poland's, there are problems in China which should be noted. While private companies are forming in China, much of the power to obtain housing, raw materials, credit, and employment is still within the control of the state

40. *See id.* at 44.

41. *See id.* at 37-38.

42. *See id.* at 39.

43. Garnett, *supra* note 35, at 64.

44. OVERHOLT, *supra* note 18, at 59.

and Communist Party bureaucrats.⁴⁵ Published and unpublished regulations and licenses required by the state slow down the process of corporate formation. Corruption exists, and government officials make better salaries than most individuals.⁴⁶

Another clash between economic progress in China and the reality of underlying problems is in the area of the law. Foreign investors believe in contract law, and the desire to do large-scale business with foreigners has forced China to create a legal system that is not arbitrary or based on state policy but governed by the rule of law.⁴⁷ Reform and openness to the outside world have precipitated calls for renovation of Chinese legal statutes including their intellectual property laws.⁴⁸ Legal reform is just beginning in China, and the rule of law is still largely confined to commercial contracts.

China is a repressive country with widespread abuses of basic human rights. Even though the massacre at Tiananmen Square in June 1989 is long gone, the persistence of human rights abuses in China today is one of the determining factors in the continued refusal of the United States to admit China into the World Trade Organization.

Despite the marked differences in the current economic conditions of China and Russia, both countries are similarly engaging in shocking abuses of their own domestic intellectual property laws. Both countries are violating international intellectual property agreements recently adopted in response to pressure from the Western world, which is reflected in US-USSR and US-China trade agreements.⁴⁹ In both China and Russia, where views on ownership of property similarly reflect the common socialist ideological background, the government, government institutions, and many individuals allegedly engage in pirating. Government violations of domestic and international intellectual property law make it all the more difficult to discourage this illegal practice by corporations and individuals.

45. See *id.* at 79.

46. See *id.* at 80-81.

47. See *id.* at 143.

48. Chih-Yu Shih, *China's Socialist Law Under Reform: The Class Nature Reconsidered*, 44 AM. J. COMP. L. 627 (1996).

49. *U.S.-China Intellectual Property Accord, 1995: Hearings on U.S.-Sino Intellectual Property Rights Agreement before the Subcommittee on East Asian and Pacific Affairs of the Senate Committee on Foreign Relations*, 104th Cong., 1st Sess. (1995) (statement of Charlene Barshefsky, Deputy U.S. Trade Representative) [hereinafter Barshefsky].

I. CHINA

A. *The History and Development of Chinese Domestic Intellectual Property Laws and China's Compliance with International Intellectual Property Conventions*

Chinese intellectual property laws protecting trademarks, patents, and copyrights actually predate the Soviet-inspired laws.⁵⁰ Throughout imperial Chinese history⁵¹ there were no counterparts to contemporary ideas of intellectual property law.⁵² Chinese writers, artists, and creators in all areas of knowledge had significant reverence and attachment for the past which resulted in legitimized copying.⁵³ In the eighteenth century under the Qianlong dynasty, the Emperor maintained indifference to foreign objects, manufactures and ideas.⁵⁴ This negative attitude toward innovation soon changed, and China passed formal legal measures to systematically protect "ingenious" objects.⁵⁵ As foreign economic involvement in China continued and expanded in the late nineteenth century, complaints of the unauthorized use of foreign trade names and trademarks began to arise.⁵⁶ By the turn of the century intellectual property problems increased in China, and foreign merchants, expecting that the integrity of their trademarks duly registered at home would be protected in China, were disappointed in China.⁵⁷ But these foreign merchants failed to take action against China's non-compliance with international standards set forth in the Paris Convention in 1883 and the Berne Convention in 1886 to which China was not yet a signatory.⁵⁸ Foreign merchants did not try to redress their grievances concerning the Chinese infringement of trademarks, but instead concentrated on the promise of a market of "four hundred million customers."⁵⁹

Chinese intellectual property laws were adopted at various stages before and after the establishment of the People's Republic of China in 1949. The development of laws regulating crea-

50. See generally WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* (1995) (offering a detailed account of the history of Chinese intellectual property laws).

51. See *id.*

52. See *id.* at 19.

53. See *id.* at 29.

54. See *id.* at 30.

55. See *id.*

56. See *id.* at 34.

57. See *id.*

58. See *id.*

59. See *id.* at 35.

tive and inventive endeavor was an integral part of an effort in the early part of the twentieth century to foster a new legal system in China.⁶⁰ For example, the first intellectual property law was passed in 1928, a copyright law which is no longer in effect.⁶¹ Urbane lawyers who prepared China's modern republican code in the 1930s created laws including the Copyright Law of 1928, which were profoundly at odds with the central government's mission to control the flow of ideas and were, thus, generally not enforced.⁶²

With the establishment of the Chinese People's Republic (PRC) on October 1, 1949, the Chinese Communist Party invalidated the entire corpus of republican law and began to articulate a new legal system modeled after the USSR.⁶³ The Soviet model reflected traditional Chinese attitudes toward intellectual property and expounded the socialist belief that by inventing or creating, individuals were engaging in social activities based on knowledge that belonged to all members of society.⁶⁴ The early efforts at regulating intellectual property rights in the PRC are limited to laws regulating only patents and trademarks. Patent law of the early PRC is reflected in the Provisional Regulations on the Protection of Invention Rights and Patent Rights of August 11, 1950⁶⁵ which followed the Soviet two-track system by granting a state certificate of invention to select inventors on the preferred track. With respect to trademarks, in 1950 the Chinese government promulgated Procedures for Dealing with Trademarks Registered at the Trademark Office of the Former Guomindang Government and the Provisional Regulations on Trademark Registration.⁶⁶ Relatively few holders of marks sought to avail themselves of the opportunity to register their marks because registration was not required, intellectual property law remained unfamiliar, and people feared political consequences of asserting such property interests.⁶⁷ No comparable provisional regulations were promulgated with respect to copyright during the early years of the PRC.⁶⁸ In imitation of the Soviet system, the Chinese government asserted control over the content of what was published. Authors were entitled to fixed

60. *See id.* at 50.

61. *See id.*

62. *See id.* at 54.

63. *See id.* at 56.

64. *See id.* at 57.

65. *See id.*

66. *See id.* at 59.

67. *See id.*

68. *See id.*

"basic payments" for their work and had the right to prevent unauthorized alteration of their work.⁶⁹ Enjoyment of this right was dependent on approval by the state which controlled all authorized publishing outlets.

Both the Anti-Rightist Movement of 1957 and the Great Leap Forward of 1958-1960 raised serious doubts about providing material incentives for people engaged in inventive, creative, and commercial activity.⁷⁰ China's intellectual property laws of the 1950s were amended during this repressive period to reduce property rights.⁷¹ The Chinese government enacted regulations which removed patent protection from the law and specified that inventions and improvements in technology were to be the exclusive property of the state.⁷² This rights-based retrenchment was not limited to inventive activity, and new regulations on trademark registration were enacted without any mention of rights of exclusive use. This simply required that all trademarks be registered, that the quality of the products be stated, and that the quality control over products be regulated by a General Administration of Commerce which had the power to cancel trademark registrations for substandard products.⁷³ Although there were no comprehensive provisional copyright regulations in China, remuneration to authors formerly based on the number of books printed or reprinted was henceforth eliminated, in keeping with the move to curtail rights.⁷⁴ Limited remuneration to authors was now based on quality rather than quantity.

In the period called the Great Proletarian Cultural Revolution which began in 1966, further restrictions on intellectual property were implemented. Theaters were banned, all activities of scientists, writers and other intellectuals were disrupted, and many so-called dissident creators of art and science were imprisoned.⁷⁵ In this repressive environment, intellectual property laws were also revised. The state ceased to provide the already reduced remuneration for inventors, and individuals engaging in creative endeavors were too fearful to acknowledge their personal role in inventive activity.⁷⁶ As for copyright, those authors whose works were deemed worthy of publication were unable to

69. See *id.* at 61.

70. See *id.* at 61.

71. See *id.* at 62.

72. See *id.*

73. See *id.* at 63.

74. See *id.*

75. See *id.* at 64.

76. See *id.* The compulsory trademark registrations system established in 1963 was halted.

secure protection. The state itself freely reproduced or tolerated the reproduction of such works without permission of the author or original publisher, without providing any remuneration, and in some instances even without acknowledging authorship.⁷⁷ Therein lies one source of the practice of intellectual property piracy in China today.

By 1975, Deng Xiaoping and other leaders were concerned about China's slow development, and they requested a program of modernization. The Cultural Revolution officially ended in 1976. By 1977, modernization efforts played a central policy role under the leadership of Deng Xiaoping.⁷⁸ He sought to restore the intellectual property laws that were in place before the Cultural Revolution began. Thus, the Chinese government reissued the 1963 regulations covering patents and providing monetary rewards for inventors.⁷⁹ During this period leaders made similar efforts to return trademark laws to the status quo. China reconstituted the State General Administration for Industry and Commerce (SGAIC), the China Council for the Promotion of International Trade (CCPIT), and the 1963 Trademark Regulations requiring registrations of marks.⁸⁰ With respect to copyright, in 1977 the government issued the State Administration of Publication of the Trial Circular Concerning Basic and Supplemental Payments for News Publications which returned remuneration to authors at the same level of compensation that they were entitled to before the Cultural Revolution.⁸¹ Later payments to authors will be granted at a level consistent with those made prior to the Great Leap Forward.⁸²

With these legal measures now in place, the United States and the PRC were able to conclude a trade agreement in 1979,⁸³ which prompted the further revision of intellectual property legislation. Generally, the Chinese, wishing to receive foreign technology and other international economic benefits, were in favor of developing a new patent system. The United States continued

77. See *id.* at 64-65.

78. See *id.* at 65.

79. See *id.* See also *infra* text accompanying notes 114-36 (discussing in detail China's patent laws).

80. See ALFORD, *supra* note 50. See also *infra* text accompanying notes 90-113 (discussing in detail China's trademark laws).

81. See ALFORD, *supra* note 50, at 66. See also *infra* text accompanying notes 137-84 (discussing in detail China's copyright laws).

82. See ALFORD, *supra* note 50, at 66.

83. Agreement on Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4652 [hereinafter The 1979 Trade Agreement]. See *infra* text accompanying notes 185-94.

to be concerned about the piracy of its intellectual property. Ironically, leading Chinese publications were suggesting that the failure to obtain patent protection abroad for Chinese inventions had resulted in the appropriation of Chinese inventions by foreigners.⁸⁴ But others in China opposed the adoption of a patent system, for it was deemed incompatible with socialist ideology and inherently corrupting.⁸⁵ Despite the conflict among the Chinese leaders, Deng Xiaoping determined that China should adopt a new patent law. The Patent Law was ultimately passed on March 12, 1984, after more than five years of drafts and redrafts reflecting the internal conflict.⁸⁶

Protective intellectual property laws were passed in the 1980s as a result of the 1979 Trade Agreement entered into by the United States and the PRC, but intellectual property piracy continued well into the 1990s. Two more trade agreements between the United States and the PRC were signed in 1992 and 1995 and resulted in more protective intellectual property laws.⁸⁷ Currently, protection for intellectual property in China is not provided solely by the trademark, copyright, and patent laws. For instance, some forms of unfair competition, such as passing-off, are prohibited.⁸⁸ Additional protection for intellectual property is also provided on the basis of contract law, the Law on Foreign Economic Contracts, and the Regulations on the Administration of Technology Import Contracts.⁸⁹

B. *Chinese Trademark Laws*

Among the three areas of intellectual property law, China accorded legal protection to trademarks first. In 1904, China issued the Trial Regulations for Trademark Registration.⁹⁰ The law lapsed because it placed the interests of foreigners second to nationals. The Trademark Law of 1923 and the Trademark Law of 1931, which revised the 1904 Trial Regulations for

84. ALFORD, *supra* note 50, at 68.

85. *See id.*

86. *See id.* at 69.

87. *See infra* text accompanying notes 196-225.

88. ARTHUR WINEBURG, INTELLECTUAL PROPERTY PROTECTION IN ASIA § 3.02 n.5 (1994) (citing Trade Mark Law, Art. 40 (1982 Chinese Trademark Law) and Trade Mark Regulations Rule 45 (1983 Chinese Trademark Regulations)).

89. *See id.*

90. Jesse T.H. Chang & Charles J. Conroy, *Trademark Law in the People's Republic of China*, in FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA 267 (Michael J. Moser ed., 1984).

Trademark Registration, offered little change.⁹¹

China issued the Provisional Regulations Governing Trademark Registration in 1950⁹² which were replaced in 1963 by Regulations Governing the Control of Trademarks.⁹³ From 1963 on, foreigners were permitted to register their marks in China.⁹⁴ China promulgated a comprehensive trademark law in 1982, with accompanying implementing regulations a year later. These regulations were abandoned in 1988, and Detailed Rules for the Implementation of Trademark Law were enacted again. China joined the Madrid Agreement for International Registration of Trademarks in July 1989.⁹⁵

The 1982 Chinese Trademark Law offers protection "for the exclusive right to use a trademark," but these rights are created only in so far as they foster the development of the socialist market economy.⁹⁶ As with patent, trademark rights and remedies are more restricted than the laws seem to indicate. The 1982 Chinese Trademark Law denies protection to service marks,⁹⁷ collective marks, certification marks, and defensive marks as well as to trademarks falling into such unusual categories as "being detrimental to socialist morality or customs or having other undesirable influences," or "being ethnically discriminatory."⁹⁸ Marks have to be filed on a "per mark, per class" basis rather than on a multiclass basis thereby making it more difficult and expensive for individuals to secure protection in multiple classes. This requirement increases the possibility that persons acting in bad faith will register marks generated by others.⁹⁹ The per mark, per class requirement constitutes a potential source of trademark piracy generated by the failure of the law as written. Moreover, the trademark law's rigid adherence to a first-to-file rule and its limited procedures for opposing or seeking the cancellation of registrations made in bad faith

91. *See id.*

92. *See id.* at 267-68.

93. *See id.*

94. *See id.* at 269.

95. It is interesting to note that the Hong Kong government published a draft Trade Marks Bill on February 5, 1997 to replace its current Trade Marks Ordinance in light of the transfer of sovereignty over Hong Kong from the United Kingdom to China on July 1, 1997. *Consultation Paper on Hong Kong: New Trade Marks law*, 11 World Intell. Prop. Rep. (BNA) 77, at 104 (Mar. 1997).

96. ALFORD, *supra* note 50, at 75.

97. *See infra* text accompanying note 102 (discussing the 1993 amendment to the 1982 Trademark Law which makes service marks registrable).

98. ALFORD, *supra* note 50, at 75.

99. *See id.* at 76.

also exacerbate the problem of piracy.¹⁰⁰

The 1982 Chinese Trademark Law, as well as the 1984 Chinese Patent Law, follow the principle of first to file.¹⁰¹ The 1982 Chinese Trademark Law is silent as to whether a mark may acquire distinctiveness through use in trade.¹⁰² Under the 1982 Trademark Law, as amended in 1993, service marks are registrable, and provisions of the law concerning trademarks for goods apply to service marks.¹⁰³ "An important element of the 1982 [Chinese Trademark Law] is its emphasis on quality control and consumer protection."¹⁰⁴ Therefore, registration for marks on pharmaceuticals and tobacco is mandatory. Absent such registration the administrative authorities will not permit these goods to be sold or may impose fines.¹⁰⁵

"Certain foreign applicants are permitted to file for and obtain trademark registrations in the [People's Republic of China] on the basis of a bilateral agreement between the PRC and the foreign applicant's home country, international conventions to which the PRC and the foreign applicant's home country are members, or reciprocity."¹⁰⁶ A United States applicant has a right to apply for and obtain trademark registration in the PRC under Article 9 of the 1979 Bilateral Trade Agreement. The trademark application and all accompanying documents must be in Chinese (or if in English accompanied by a notarized Chinese translation), and the application must be accompanied by ten copies of the proposed trademark.¹⁰⁷ A certificate of registration is in force for ten years from the date of approval, and a ten-year renewal term is available.¹⁰⁸

The enforcement of trademark rights is the responsibility of the trademark owner who may send a cease-and-desist letter, and some assistance may be obtained from the CCPIT Patent & Trademark Law Office or other law firms.¹⁰⁹ "These agencies are empowered to issue cease-and-desist-order-like protection for

100. *See id.*

101. WINEBURG, *supra* note 88, at § 3.02 n.8 (citing Article 9 of the 1984 Chinese Patent Law).

102. *See id.* § 3.12.

103. *See id.* § 3.12 (D).

104. *Id.* § 3.12 (E).

105. *See id.* § 3.12 nn.75-76 (citing Rule 7 and Arts. 5, 33 of the 1982 Trademark Law).

106. *Id.* § 3.13.

107. *See id.* § 3.15 (citing Rule 9 of the 1982 Chinese Trademark Law).

108. *See id.* § 3.19 (citing Arts. 23 and 24 of the 1982 Chinese Trademark Law).

109. *Id.* at § 3.24 (citing Art. 39 and Rules 42, 43).

infringement and to order the payment of compensation."¹¹⁰ The collection of damages is based on illegal profit obtained by the infringer during the infringing period or the loss suffered by the owners caused by the acts of infringement.¹¹¹

Alternative relief may be obtained through formal or informal mediation by the CCPIT's arbitration commission. Finally, a civil suit may be brought directly in the [Chinese People's Court], or by way of appeal from an administrative decision. A civil suit may take anywhere from six months to two years to conclude.¹¹²

Remedies are problematic in the 1982 Chinese Trademark Law because of the emphasis on the administrative resolution of infringement and the failure to articulate procedures for the resolution of infringement problems.¹¹³

C. Chinese Patent Laws

Provisional Rules of the Encouragement of Arts and Crafts, the first Chinese law in the area of patents, was issued in 1911 and revised in 1923.¹¹⁴ This law provides that new inventions are protectable for five years and patents are issued to Chinese nationals exclusively. Foreigners can protect patent interests only if there is a treaty to which China is a party.

China issued the Provisional Regulations Concerning the Protection of the Invention Right and the Patent Right in 1950. At this time, inventions in China were considered state property in imitation of Soviet patent law and in accordance with Marxist theory.¹¹⁵ In 1954, Provisional Regulations on Awards for Inventors, Technical Improvements and Rationalization Proposals Relating to Production were added.¹¹⁶ Patents were given to enterprises and could be made available to others if they were not worked within three years after being granted. Amended in

110. See *id.*

111. See *id.* § 3.24.

112. See *id.*

113. ALFORD, *supra* note 50, at 76.

114. See ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 51 (1987) (analyzing the patent laws in China). See generally Ross J. Oehler, Note, *Patent Law in the People's Republic of China: A Primer*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 451 (1987) (offering further background information).

115. See CHENGSI, *supra* note 114, at 53 (distinguishing between Soviet and Chinese patent protection by explaining that a foreign enterprise using a Soviet invention owed royalties to the state, while in China, a foreign transfer divested both the inventor and the state from exclusive rights to the invention).

116. L. Mark Wu-Ohlson, *A Commentary on China's New Patent and Trademark Laws*, 6 NW. J. INT'L L. & BUS. 86, 89 (1984).

1978, these regulations were finally replaced by a cohesive patent law system in 1984.¹¹⁷ In 1980, a Patent Bureau was established in China.

The Memorandum of Understanding concerning the protection of intellectual property (1992 MOU)¹¹⁸ was signed on January 17, 1992, just after a Super 301 investigation was initiated in 1991 and ultimately halted in December 1991. The 1992 MOU extended patent protection to chemical (pharmaceutical and agricultural) inventions for a term of twenty years from the date of application. Compulsory licensing was diluted. China agreed to enact the relevant law by January 1993. China joined the Patent Cooperation Treaty in 1992.

The 1984 Chinese Patent Law and the Implementing Regulations of the Patent Law constitute the current regime of patent protection in the PRC. The 1984 Chinese Patent Law provides for the granting of "patent rights" to persons or entities with "invention-creations" meeting the requisite standards of novelty, inventiveness, and practicality. The 1984 law reflects an uneasiness in China about adopting the concept of legitimate ownership of any form of private property.¹¹⁹ For example, the 1984 Chinese Patent Law makes it difficult for individuals to secure rights which might provide them with a monopoly, but it does promise individuals material rewards in order to spur on invention.¹²⁰ Moreover, the 1984 Chinese Patent Law moves away from invention patents with a fifteen-year term toward a utility model which offers lesser rights and only a five-year term.¹²¹ The 1984 Chinese Patent Law also limits rights and grants instead monetary rewards for inventions.¹²² As further examples of its limits on rights, the 1984 Chinese Patent Law provides for compulsory licensing. It also fails to provide the Chinese with the same priority rights granted to foreigners who filed patent applications abroad and are thereby granted a twelve-month priority period to file in China.¹²³

As with trademarks, the 1984 Chinese Patent Law follows a first-to-file system.¹²⁴ Therefore, the first to file the patent

117. CHENGSI, *supra* note 114, at 53-56.

118. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1992 NATIONAL TRADE REPORT ON FOREIGN TRADE BARRIERS 48 (1992) [hereinafter 1992 NATIONAL TRADE ESTIMATE]. See *infra* text accompanying notes 195-198 for a discussion of the 1992 MOU.

119. Alford, *supra* note 50, at 70.

120. See *id.*

121. See *id.*

122. See *id.* at 70-71.

123. See *id.* at 71.

124. WINEBURG, *supra* note 88, § 3.02 n.8 (citing Art. 9 of the 1984 Chinese Patent

rather than the first to invent the subject invention is the owner of the patent. Patent protection is available for only certain subject matter, and nine categories of subject matter are not patentable (for example, scientific discoveries or rules and methods for mental activities).¹²⁵ An invention or utility model that is patentable must also show novelty, inventiveness and utility, whereas a design must show only novelty to be patented.¹²⁶

The right to apply for a patent in the PRC generally belongs to the inventor-creator. "[H]owever, if the subject matter to be patented [is] invented or created primarily by using an employer's resources, or if the invention-creation [arises] in the normal course of employment, the 'service invention-creation' belongs to the employer."¹²⁷ This is similar to the "shop right" provisions of the United States patent law.

"A foreign applicant, that is, a person or legal entity having no 'habitual' residence or place of business in China, may not file a patent application directly, but must appoint an agent."¹²⁸ However, an American applicant's right to seek patent protection in the PRC is created under international treaty, by the principle of reciprocity, and more specifically under the 1979 Trade Agreement, and the PRC's Joint Venture Law and Law on Wholly Foreign-Owned Enterprises.¹²⁹ All documents must be filed in Chinese (or in English with a Chinese translation) in duplicate.¹³⁰

The patent owner may seek redress for infringement of a patent which is defined by the 1984 Chinese Patent Law as any unauthorized exploitation of the subject patent.¹³¹ Redress for infringement may be obtained through an administrative or a legal proceeding. Patent administrative authorities and the Chinese People's Courts have concurrent jurisdiction over patent infringement actions.¹³² "Administrative agencies have the authority to grant injunctions as well as to order the payment of compensatory damages. Any patent administration authority decision is appealable to a People's Court within three months of issuance."¹³³ The lower People's Courts are not available to for-

Law).

125. *See id.* § 3.02 (D).

126. *See id.* § 3.02 (E).

127. *Id.* § 3.03 (A).

128. *Id.*

129. *See id.*

130. *See id.* § 3.03 (B) (citing Rules 4, 15 & 16).

131. *See id.* § 3.09 (citing Art. 64 of the 1984 Chinese Patent Law).

132. *See id.* § 3.11 (citing Art. 60 of the 1984 Chinese Patent Law).

133. *Id.*

eign entities, but a foreign entity may sue for infringement either in an intermediate People's Court, which is preferable, or seek redress from the Administrative Authorities for Patent Affairs.¹³⁴

The problems with the 1984 Chinese Patent Law center around the issue of legal remedies. Article 60 provides that patentees seeking to protect their rights may directly institute legal proceedings in the People's Court. Despite this option, the law is directed toward an administrative resolution of problems without any real indication of what procedures exist to provide such administrative resolution.¹³⁵ For foreigners the problem is worse than for the Chinese. The 1984 Chinese Patent Law limits itself to administrative and criminal remedies with little or no provision for civil remedies.¹³⁶

D. *Chinese Copyright Laws*

Chinese copyright law went through various stages and took "a road as tortuous as that of Chinese intellectuals".¹³⁷ The first law, the Da Qing Copyright Law, was passed in 1910.¹³⁸ But Chinese translations were not protected, and treaty obligations were not enforced. Foreigners were given the same protection as Chinese nationals under a new 1928 Copyright Law.

The PRC was formed in 1949, and the new government repealed the previous 1928 Copyright Law. The PRC in 1950 and 1953 enacted a series of copyright provisions that recognized only limited rights of individual authors.¹³⁹ Political unrest in the 1950s and 1960s made it impossible for China to have a system of copyright laws comparable to other countries.

A series of regulations and related measures were passed for internal circulation only between 1980 and 1986, and they addressed the production of written and audiovisual materials. These pronouncements rarely addressed the issue of illegal copying or copyright per se, and they concentrated mainly on categories of potentially subversive materials.¹⁴⁰

134. See *id.* § 3.11 n.65.

135. ALFORD, *supra* note 50, at 73.

136. See *id.* at 74.

137. See *id.* at 76 (citing Jiang Ping, a noted civil law specialist and head of the Committee on Legal Affairs of the Standing Committee of the NPC in the late 1980s).

138. See Guo Shoukang, *China*, in *INTERNATIONAL COPYRIGHT LAW AND PRACTICE* CHI-5-CHI-79 (Paul Edward Geller ed., 1995).

139. See *id.* at CHI-7-CHI-8.

140. ALFORD, *supra* note 50, at 77.

In 1986, the General Principles of the Civil Law were promulgated and Article 94 of the General Principles provided the PRC's first major public recognition of the notion of copyright.¹⁴¹ Article 94 of the Principles of the Civil Law was very general, providing citizens and legal persons with rights of authorship (copyright), and granting them the right to sign their names as authors, issue and publish their works, and receive remuneration in accordance with the law.¹⁴²

A National Bureau of Copyright was established, and a new copyright law was adopted in 1990. The PRC's first copyright law was enacted on September 7, 1990, and June 1, 1991 was its effective date.¹⁴³ The PRC's instrument of accession to the Berne Convention was submitted to the World Intellectual Property Organization and took effect in October 1992.

Implementation of the 1991 Chinese Copyright Law was initiated first by the 1979 Trade Agreement and later by the signing of a Memorandum of Understanding on May 19, 1989 between the PRC and the United States. The 1989 Memorandum of Understanding related generally to the enactment and scope of a new PRC copyright law.¹⁴⁴ Implementation of the new copyright law was accelerated by a Super 301 investigation initiated by the United States Trade Representative (USTR) in 1991 for violations of intellectual property laws.

As with patent and trademark, the 1991 Chinese Copyright Law provides a more curtailed grant of rights, especially economic rights, than one would expect on initial examination.¹⁴⁵ For example, Article 16 specifies that works "created by citizens in carrying out assignments given to them by legal persons or non-legal person units" generally belong to the author, but in practice this broad statement of author's right is given a narrow view.¹⁴⁶ The 1991 Chinese Copyright Law's fair use provisions¹⁴⁷ give the state the right to make unauthorized use of copyrighted materials "to execute official duties," with only vague protection against prejudicing the rights of owners "without reason."¹⁴⁸ This provision constitutes one of the major sources of piracy of intellectual property by the Chinese state and its agencies.

141. *See id.*

142. *See id.*

143. *See id.* [hereinafter Chinese Copyright Law].

144. WINEBURG, *supra* note 88, § 3.25.

145. ALFORD, *supra* note 50, at 78.

146. *Id.*

147. *See infra* text accompanying note 163 (discussing the fair use exceptions).

148. ALFORD, *supra* note 50, at 78-79.

The 1991 Chinese Copyright Law is also restrictive with respect to tolerance for so-called dissident political views. The law provides that "works prohibited by law to be published and disseminated" are not entitled to copyright protection and "copyright holders shall not violate the Constitution and the law, or infringe upon the public interest, while exercising their copyrights."¹⁴⁹

In some ways the 1991 Chinese Copyright Law provides more rights to foreigners than it does to the Chinese. For example, the law offers foreigners the right to earn whatever royalty they can negotiate. Efforts were also made to assure foreigners that restrictions of content under Article 4 would not apply as rigidly to "acceptable works from abroad."¹⁵⁰ But in other ways the 1991 Chinese Copyright Law, as with patent, accords foreigners fewer rights than nationals. For example, Article 2 of the 1991 Chinese Copyright Law provides that works of Chinese citizens are protected "whether published or not," but those of foreigners first must "be published."¹⁵¹ Moreover, the 1991 Chinese Copyright Law vested the responsibility for administering the law in the SCA which drew many of its personnel from the SAPP, an organization which exercised censorship powers and which for decades oversaw the mass production of unauthorized copies of foreign copyrighted materials by Chinese publishers.¹⁵² This is another clandestine source of the continued failure to implement anti-piracy legislation in China.

The 1991 Chinese Copyright Law protects "literary works, oral works, musical and dramatic and choreographic works, works of fine art, photographic works, cinematographic television and video works, product and engineering designs and their explanations, maps and schematic drawings, computer programs, and other works as stipulated in laws and administrative regulations."¹⁵³ Protection is also extended to adaptations, translations, annotations and collations.¹⁵⁴ Implementing regulations extended copyright protection to three-dimensional architectural works¹⁵⁵ and "applied art" such as utilitarian articles

149. *Id.* at 79.

150. *Id.* at 79-80.

151. *Id.* at 80.

152. *See id.*

153. WINEBURG, *supra* note 88, § 3.25 (citing Article 3 of the 1991 Chinese Copyright Law).

154. *See id.* (citing Article 12 of the 1991 Chinese Copyright Law).

155. The Berne Convention requires protection of three-dimensional architectural works. *See* WORLD INTEL. PROPERTY ORGANIZATION, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS FROM 1886 TO 1986 232 (1986).

that have ornamental features (jewelry, watches, toys, and furniture). "Public documents such as regulations, administrative or judicial reports and their official translations, as well as news, calendars and numerical tables are explicitly excluded from qualifying as copyrightable subject matter."¹⁵⁶ There is no registration requirement for copyright subject matter.

The Chinese Copyright Law protects the works of "Chinese citizens, legal persons and units without the status of legal persons of China, whether published or not."¹⁵⁷ Copyright protection is extended under international conventions or bilateral agreements to which the PRC is a party.¹⁵⁸

From the time China joined the Berne Convention in 1992, all works originating in a member of the Berne Union that were not in the public domain in their country of origin became protected in China. Any use of an original or copy of a U.S. work done on a commercial scale and undertaken before the establishment of the bilateral copyright relations (the 1979 Trade Agreement) is not actionable in China. All provisions of the Chinese Copyright Law and its implementing regulations fully apply to such uses undertaken after the establishment of the 1979 Trade Agreement.¹⁵⁹

Under the new 1991 Chinese Copyright Law most copyrights are protected for the life of the author plus fifty years. Copyright licenses may not exceed ten years.¹⁶⁰ Therefore, assigning the entire copyright does not appear to be permitted. Compulsory licensing is also permitted in certain circumstances.¹⁶¹ An exclusive right of distribution applies to all works and sound recordings, including making copies available by rental. This exclusive right survives the first sale of copies.¹⁶²

The exclusive right to use the copyrighted work is further diluted by fair use exceptions, which include: the use of a published work for individual study, research or enjoyment; translation or reproduction in small quantities of published works for classroom teaching or scientific research, provided that such reproductions are for use by teachers or researchers and that they are not published and distributed; use by a state entity for the purpose of carrying out official duties; reproduction by a library,

156. WINEBURG, *supra* note 88, § 3.25 (citing Article 5 of the 1991 Chinese Copyright Law).

157. *Id.* § 3.25 (citing Article 2 of the 1991 Chinese Copyright Law).

158. *See id.* (citing Article 2 of the 1991 Chinese Copyright Law).

159. *See id.* at n.123.

160. *See id.* (citing Article 26 of the 1991 Chinese Copyright Law).

161. *See id.* § 3.25.

162. *See id.*

archive, museum or art gallery for the purpose of exhibiting or preserving a work; and gratuitous performances.¹⁶³

The fair use exceptions, legalized in the 1991 Chinese Copyright Law, are one source of infringement and abuse by Chinese government officials, corporations, and individuals engaged in commercial activity and piracy of copyrighted works.

Infringement of copyrighted works may give rise to civil liability (injunctions, compensation, and public apology) for the "unauthorized publication of a work; adapting, compiling, broadcasting or performing a work without authorization; and 'other infringements of copyright and neighboring rights.'" ¹⁶⁴ Fines may be imposed, and unlawful income can be confiscated if the unauthorized reproduction and distribution of a work is in pursuit of profit. Similar remedies may be imposed if one publishes a book to which another person has exclusive publication rights, or reproduces and distributes a radio or television program without permission.¹⁶⁵ The 1991 Chinese Copyright Law's remedy provisions are similar to those of patent and trademark laws. Although parties have the right to proceed directly to the People's Courts, the emphasis in China is on administrative solutions with few procedural specifications for the resolution of infringement problems.¹⁶⁶

Software protection under the 1991 Chinese Copyright Law has an interesting history and provides some insight into the sources of piracy. A draft to govern the protection of software under the 1991 Chinese Copyright Law entitled "Regulations for the Protection of Computer Software"¹⁶⁷ (Computer Software Regulations) was circulated in early 1991 and published three days after the 1991 Chinese Copyright Law.¹⁶⁸ The Computer Software Regulations seem to provide a wide range of rights, but in reality are subject to a variety of qualifications limiting these rights. For example, the Computer Software Regulations fail to indicate clearly whether software is a literary work, leave uncertain what is meant by a first publication, and do not cover programs embedded in semiconductor chips.¹⁶⁹ Furthermore, the Computer Software Regulations limit the scope of rights granted by expansive provisions regarding national interest. Article 31 of

163. *Id.* (citing Article 22 of the 1991 Chinese Copyright Law).

164. *Id.* (citing Article 46 of the 1991 Chinese Copyright Law).

165. *See id.*

166. ALFORD, *supra* note 50, at 80.

167. *See id.* (discussing the Computer Software Regulations).

168. *See id.*

169. *See id.*

the Computer Software Regulations specifies that similarities between newly developed and existing software will "not constitute infringement of . . . copyright . . . if the similarity is necessary for the execution of national policies, laws, regulations, and rules . . . or for the implementation of national technical standards."¹⁷⁰ No definition is provided for "national policies" or "national technical standards" and, even worse, no compensation is provided for software developers affected by this provision.¹⁷¹ Software published prior to the issuance of the Computer Software Regulations on June 4, 1991, most of which belonged to foreigners, is presumed to be in the public domain.¹⁷² The Computer Software Regulations exonerate persons accused of infringement if they do "not know or have no reasonable basis for knowing that the software is infringing."¹⁷³ This provision leaves software copyright holders with the burden of having to seek out the "suppliers" of infringing items in order to obtain redress of grievances. These and other similar provisions in the Computer Software Law are tantamount to a wholesale license to piracy of intellectual property by the state. In response to China's enforcement procedures there is little wonder why Joseph Massey, the Assistant United States Trade Representative, called China the "single largest pirate world-wide."¹⁷⁴

Remedies for software infringement are as problematical as the remedies for patent and trademark rights' infringement. For example, as a prerequisite to seeking either administrative or judicial enforcement of their rights, software developers are required to provide key proprietary data to the Ministry of Electronics Industry in a painstaking registration process.¹⁷⁵

The Computer Software Regulations provide limited protection for software because software is protected as an "industrial work" rather than as a "literary work." This classification limits the protection of software to outright piracy, that is, literal copying. Rights to the software are for one term that only lasts twenty-five years. Under these regulations the formalities and costs for registering a software copyright are daunting. The registration process requires providing a source code. This formality, coupled with the protection being limited to literal copying, allow public disclosure of a source code to constitute an invita-

170. *Id.* at 81.

171. *See id.*

172. *See id.*

173. *Id.*

174. *Id.* at 86.

175. *See id.* at 81.

tion to legalized copying of the software. The Computer Software Regulations do not specify whether new versions of old software require a separate registration, nor whether retroactive protection is available for software created prior to June 1, 1991. As a result of these problems, software companies in the United States voiced serious objections to this law.¹⁷⁶

China met with the United States Trade Representative in 1991 pursuant to a Section 301 investigation for piracy of software. After this meeting China issued new regulations on June 13, 1991 which extended copyright protection to fifty years and did away with the requirement of a source code. Software first published overseas would be protected if the software was registered in China within thirty days.¹⁷⁷ These regulations still did not satisfy American software companies.

In order to end the Section 301 investigation, China agreed to protect computer programs as a "literary work" under the Berne Convention and to delete the registration formalities. The United States agreed to release China from any duty to pay royalties to software already pirated. However, software already in the possession of government agencies, companies, and individuals, without license, could continue to be used as long as this software was not further copied or distributed for commercial purposes.¹⁷⁸ China issued Measures for the Registration of Copyright in Computer Software on April 6, 1992.

China was forced to join the Berne Convention by June 30, 1992 and to join the Geneva Convention for Protection of Producers of Phonograms by June 1, 1993. China's accession to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms was actually made on November 7, 1992.¹⁷⁹ This law provides that software is classified as a "literary work" and receives fifty years protection accorded other copyrighted works. China also joined the Universal Copyright Convention in 1992.

On July 5, 1995, the State Council of the Chinese government promulgated "The Customs Regulations for the Protection of Intellectual Property Rights of the People's Republic of China" designed to provide effective protection of intellectual property rights at the border.¹⁸⁰ This law became effective on October 1, 1995. In accordance with this law, Chinese Customs is author-

176. WINEBURG, *supra* note 88, § 3.25.

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.* § 3.26.

ized to protect intellectual property rights relating to articles either imported into or exported out of China. Any owner of intellectual property rights in China may record his rights with the relevant Customs authorities. The owner may apply thereafter to have Customs detain or confiscate infringing articles. The recordation is effective for seven years from the date of Customs' approval. It is not clear whether the exclusive licensee may apply for this protection.¹⁸¹ If the receiver or sender of the articles is knowingly aware that the import or export of such articles will infringe intellectual property rights of others, or if he falsely reports to Customs about the status of intellectual property rights, he will be fined up to the amount of CIP or FOB prices of the imported or exported articles.¹⁸²

China introduced new anti-piracy legislation in 1997 as part of a renewed campaign to curb copyright theft.¹⁸³ The National Copyright Administration said that long-standing promised changes to China's 1991 Copyright Law will be enacted, along with other measures, in a bid to ensure that domestic legislation is "consistent" with international standards.¹⁸⁴

E. *Chinese Trade Secrets*

China agreed to enact a law providing for adequate protection of trade secrets to be completed by January 1, 1994.¹⁸⁵

F. *Trade Agreements Affecting Intellectual Property*

Three trade agreements affecting intellectual property were signed between the United States and China in 1979, 1992, and 1995.

1. *The 1979 Trade Agreement.* After Deng Xiaoping opened up China to market reform in 1979 and the United States and China established diplomatic relations, the Chinese and the Americans signed an "Agreement on Trade Relations" (1979 Trade Agreement).¹⁸⁶ The 1979 Trade Agreement basically

181. See *id.* § 3.26.

182. See *id.*

183. *China To Revise Copyright Law To Meet International Standards*, 11 World Intell. Prop. Rep. (BNA) 77, at 81 (Mar. 1997).

184. See *id.* at 82.

185. *China Says It Will Draft Law To Protect Commercial Secrets*, 10 World Intell. Prop. Rep. (BNA) 381, at 385 (Dec. 1996).

186. See 1979 Trade Agreement, *supra* note 83. See also *infra* text accompanying notes 257-67 (discussing in detail Chinese unfair trade practices).

sought to protect American owners of patents, trademarks, and copyrights in China.¹⁸⁷ The 1979 Trade Agreement provided that "Each Party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party."¹⁸⁸ Article 5 provided copyright protection to United States nationals.¹⁸⁹ In the 1979 Trade Agreement, the United States and China agreed to permit trademark registration on the basis of reciprocity; to ensure trademark, patent, and copyright protection equivalent to the protection correspondingly accorded by the other country; and to restrict unfair competition involving the unauthorized use of industrial property.¹⁹⁰

The 1979 Trade Agreement encouraged China to introduce legislation in all areas of intellectual property. During the next ten years many laws were passed and alterations and revisions of these were promulgated. In 1980, a Patent Bureau was established, and in 1985 a Patent Law was promulgated. In 1980, China became a member of the World Intellectual Property Organization (WIPO),¹⁹¹ and in 1984 China became a member of the Paris Convention for the Protection of Industrial Property.¹⁹² In 1982, China promulgated a comprehensive trademark law accompanied by implementing regulations a year later. In July 1989, China joined the Madrid Agreement for International Registration of Trademarks.¹⁹³

Despite China's introduction of legislation in all areas of intellectual property during the 1980s, the United States was not satisfied with China's continued failure to adopt more protective anti-piracy laws. Piracy cost United States exporters approximately \$10-25 million in lost sales in 1987.¹⁹⁴ Moreover, the lack

187. See 1979 Trade Agreement, *supra* note 83.

188. See *id.* at Art. VI, para. 3.

189. See *id.* at Art. VI, para. 5.

190. See *id.*

191. See generally, *Welcome to W.I.P.O.*, Mar. 3, 1997 <<http://www.wipo.com>> (on file with author and the *Buffalo Law Review*). WIPO administers the World Intellectual Property Treaties such as the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305, and Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised in Paris, July 24, 1971, 828 U.N.T.S. 221. *Id.*

192. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 221.

193. Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 314 (1996) (citing the Madrid Agreement for International Registration of Trademarks, July 1989).

194. 1992 NATIONAL TRADE ESTIMATE, *supra* note 118.

of copyright protection for computer software and piracy costs American businesses approximately \$70-150 million each year.¹⁹⁵

2. *1992 China-United States Memorandum of Understanding on the Protection of Intellectual Property (1992 MOU)*. To retaliate against the piracy of intellectual property in the 1980s, the USTR identified China as a "priority foreign country" on April 26, 1991.¹⁹⁶ Threats of a Super 301 investigation began in 1990. On May 26, 1991 the USTR initiated a Super 301 investigation into the state of intellectual property protection in China.¹⁹⁷ As a result of this investigation China adopted a new Copyright Law in 1990, the 1991 Chinese Copyright Law. A National Bureau of Copyright was also established. Nevertheless, threats of a trade war between China and the United States loomed by December 1991. At the final hour China and the United States signed a Memorandum of Understanding (1992 MOU)¹⁹⁸ on the Protection of Intellectual Property on January 17, 1992 just after the Super 301 investigation was halted.

As required by the 1992 MOU, China acceded to the Berne Convention on October 15, 1992 and the Universal Copyright Convention in October of 1992. It also joined the Patent Cooperation Treaty in 1992. China issued Measures for the Registration of Copyright in Computer Software on April 6, 1992.

China expected that its introduction of new laws would attract foreign capital and stop, or at least reduce, criticism from foreign investors, particularly the United States.¹⁹⁹ Rather than quelling American fears and objections, these new laws turned United States' attention to China's lack of enforcement of their own domestic intellectual property laws. United States' grievances on the non-enforcement of intellectual property laws and alleged rampant piracy piled up. The United States complained of its trade deficit with China in 1994, estimated at between \$29 and \$37 billion, linking trade deficits with Chinese unfair trade practices. Moreover, the United States claimed that intellectual property piracy costs American industries \$1 billion a year in lost revenues adding to the deficit.

195. *See id.* at 42.

196. *See id.* at 48.

197. *See id.*

198. Memorandum of Understanding on the Protection of Intellectual Property, Jan. 17, 1992, U.S.-P.R.C., 34 I.L.M. 676 [hereinafter 1992 MOU].

199. Endeshaw, *supra* note 193, at 313.

3. *1995 Agreement Regarding Intellectual Property Rights (1995 MOU)*. Sino-American negotiations on intellectual property began in June 1994 and lasted nine rounds until a new agreement was finally reached in 1995. During these negotiations eight issues were presented for Chinese agreement. The most important issues involved access to China's market, tougher action against copyright infringement, and the closure of twenty-nine alleged pirating factories in southern China, some of which were state owned.²⁰⁰ The dispute between China and the United States forced the USTR representative, Mickey Kantor, on February 4, 1995 to announce that the dreaded Section 301 sanctions would be imposed against Chinese goods if an agreement were not reached by February 25, 1995.

The areas of dispute between the Chinese and the Americans were identified clearly in a study of the United States Semiconductor Industry Association (SIA). The study identified problems such as the misappropriation of intellectual property, imposition of ad hoc taxes and charges, corruption, smuggling, frequent sweeping changes in laws and regulations, and the blurring of lines of authority.²⁰¹ In addition to these charges, the prohibition on foreign law firms to handle Chinese legal affairs or to appear before Chinese courts impeded foreign proprietors of intellectual property from pursuing their claims against alleged infringers.²⁰² China responded to this particular criticism by introducing an arbitration procedure to handle disputes arising from the lag between legislation and enforcement.

In 1995, American opposition to Chinese piracy practices mounted and resulted in threatened sanctions. China responded by threatening to retaliate against the United States with sanctions. China also threatened retaliation against the big three American car makers and to suspend new ventures with United States companies in the chemical, audiovisual, and car sectors, if the Section 301 sanctions were implemented.

Throughout the volatile period in which the United States and China were close to a trade war, the United States adopted a contradictory trade policy. The United States increased its vocal protest against Chinese intellectual property piracy and increased its demands for market access while increasing its trade and business transactions with the pirating nation. The Americans insisted that economic and political barriers to the entry of United States products into China's entertainment market en-

200. See *id.* at 315.

201. See *id.* at 316.

202. See *id.* at 315.

courage piracy because "bootleggers step in to meet demands for foreign movies, compact discs, and tapes unavailable from the legal producers."²⁰³

The United States' contradictory trade policy toward China was visible in February 1995, around the time threats of sanctions were being made by the USTR against China. At that time, the United States signed thirty-four contracts worth more than \$6 billion in Beijing, eight contracts worth \$2 billion in Shanghai on energy efficiency technology development and nuclear fuel research, and twenty-six joint ventures valued at \$4 billion in renewable energy, electricity, gas and oil.²⁰⁴ A trade war with China seemed imminent, but this did not stop the United States from jockeying to remain in the Chinese market by concluding new contracts. To push China into a trade war with the United States and impose sanctions for piracy would result in American businesses losing to European or other competitors. This contradictory policy continues in the 1990s, and has been linked to the Clinton campaign finance practices.²⁰⁵

Certain industries in America, like the aerospace companies, are keen on capturing a bigger share of the aerospace market in China and are less interested in retaliation against intellectual property piracy. But the American entertainment and high-technology companies, which lose billions of dollars in lost sales to pirating, desire tougher action against China. This conflict within American industries has not helped the American position toward piracy of intellectual property in China. The Chinese recognized the value of the schism within the American industries and attempted to exploit it to their advantage by threatening to retaliate.²⁰⁶

China has its own needs just as do the Americans, and this mutuality makes trade negotiation on intellectual property and market access feasible. China needs United States investments and imports to transform its labor-intensive factories to high-capital, high-technology factories.²⁰⁷ China is eager to join the WTO, and China does not want to be excluded from the huge

203. See *id.* at 316 (citing *Both Sides Report Progress in U.S.-China Trade Negotiations*, L.A. TIMES, Feb. 24, 1995, at D2).

204. See *id.* at 318.

205. See *id.* Many people believe that politics as well as economics guides U.S. trade policy towards China. The recent campaign scandal has been linked to U.S. trade policy. See David E. Sanger, *Clinton Effort on Freer Trade is Losing Steam*, N. Y. TIMES, June 9, 1997, at A1 ("China's entry into the World Trade Organization [has] been bogged down . . . the campaign finance scandal is to blame . . .").

206. See *id.* at 320.

207. See *id.*

United States market. In fact, both sides need each other and a trade war would not benefit either country.

In light of the contradictory American trade policy and fears of a trade war, an important trade agreement was signed on February 26, 1995.²⁰⁸ This agreement, referred to as the 1995 Memorandum of Understanding on the Agreement on the Enforcement of Intellectual Property Rights (1995 MOU), was designed to enforce China's intellectual property laws and combat piracy. The 1995 MOU set forth guidelines and requirements for both an immediate crackdown on intellectual property piracy and a long-term strategy for the enforcement of intellectual property rights.²⁰⁹ The 1995 MOU was cheered as an important victory for the Clinton Administration and for American business.²¹⁰ The 1995 MOU produced euphoria and jubilation by United States businesses due to what they perceived of as a success against piracy in China.²¹¹

The 1995 MOU extends the 1992 MOU provisions and attempts to remedy Chinese infractions of intellectual property rights by reforming and reinforcing Chinese law which prohibits the illegal copying of intellectual property within China.²¹² The 1995 MOU authorizes China's State Council Working Conference on Intellectual Property (Working Conference) to develop an Action Plan to punish Chinese violations of intellectual property rights.²¹³

In the 1995 MOU, China also made concessions that changed existing Chinese regulations. For example, one provision allows trademark agents in China to act not only on behalf of Chinese persons but also foreign individuals. This provision requires changes in Chinese law in order to allow foreign individuals with trademarks to be as equally protected as Chinese individuals under Chinese law.²¹⁴

China also agreed to make new customs regulations to be entered into force by October 1, 1995.²¹⁵ The new regulations

208. Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, U.S.-P.R.C., 34 I.L.M. 881 [hereinafter 1995 MOU].

209. Marc D. Latman, Note, *China's Continued Failures to Enforce its Intellectual Property Agreements*, 34 INDEP. INT'L L.J. 6-7 (1996).

210. Endeshaw, *supra* note 193, at 324.

211. *See id.*

212. Frank Prohaska, *The 1995 Agreement Regarding Intellectual Property Rights Between China and the United States: Promises for International Law or Continuing Problems with Chinese Piracy?*, 4 TULSA J. COMP. & INT'L L. 169, 173 (1996).

213. *See id.*

214. 1995 MOU, *supra* note 208, at Article 1(D)(4)(b), 896, 897.

215. *See id.* at 900.

clarify the status of imported or exported goods that infringe on intellectual property rights. The new regulations empower customs agents to enforce the necessary and applicable Chinese laws prohibiting infringing goods from entering or leaving China. Chinese customs agents must also enforce copyrights where the applicant for enforcement presents legal proof of copyright which can be satisfied by a copyright registration certificate of that nation in compliance with the Berne Convention.²¹⁶ Chinese customs will enforce trademarks if the applicant has a "Trademark Registration Certificate" or confirms the well-known status of the unregistered marks.²¹⁷

China continues to violate customs laws affecting intellectual property by engaging in clandestine traffic of exports through Hong Kong. Sometimes a Hong Kong label is deftly placed on a product and is shipped as if originating out of Hong Kong rather than China.²¹⁸ This illegal export practice costs the United States billions of dollars.

Generally, the 1995 MOU provides: (1) tougher penalties for piracy, including revocation of business licenses and criminal prosecutions for serious offenders; (2) stiffer customs checks at China's borders and increased powers for customs officers to search and destroy; (3) an immediate halt of all exports of counterfeit goods from China; (4) transparency of censorship and other rules and more access to the enforcement system (the court system, in particular, where the United States could seek legal sanctions and financial penalties against infringing Chinese businesses); (5) lifting of all import restrictions (such as quotas and licensing requirements) on United States' products which were believed to have been the major cause for piracy; (6) the establishment of joint ventures to produce, distribute and sell United States' works in China; and (7) the submission of a regular report by China on the state of the enforcement of intellectual property rights in China with regard to the United States.²¹⁹

Skepticism about the efficacy of the 1995 MOU abounds.²²⁰ One wonders whether Beijing can actually enforce this agreement against offenders in far away provinces which have grown

216. Prohaska, *supra* note 212, at 175.

217. 1995 MOU, *supra* note 208, at Article 1(G)(2) (for a complete discussion of the customs enforcement provisions).

218. Raymond Bonner, *Altering Labels, Not Clothes, China Sidesteps Trade Limits*, N.Y. TIMES, Apr. 1, 1997, at A1.

219. Endeshaw, *supra* note 193, at 326.

220. Prohaska, *supra* note 212, at 179.

accustomed to running their own show.²²¹ Some suspect that the pirates are often well-connected, maybe even government officials, and for this reason the central government cannot exert full control over provincial leaders and powerful army officers tied to local industries making hefty profits without paying licensing fees.²²²

Another serious problem is that Chinese courts are populated with political appointees or have inadequately trained staff which discourages foreigners from filing claims in Chinese courts.²²³ China has been accused of exploiting the United States' open market while closing their market to United States products. They have used a whole array of non-tariff barriers, quotas, licensing requirements, sanitary standards not based on scientific principles, and other laws and regulations to keep American and other competitive foreign products out of China.²²⁴

China's failure to adequately comply with the 1995 MOU Agreement on the Enforcement of Intellectual Property Rights caused the United States government to once again threaten trade Section 301 sanctions. If China had failed to show significant compliance with the 1995 agreement by February 26, 1996, the United States threatened to enact \$1 billion in trade sanctions against China by means of a Section 301 proceeding.²²⁵

G. *Piracy of Intellectual Property in China*

1. *Quantification.* "Throughout the 1980s and well into the 1990s China's publishers liberally reproduced foreign materials without authorization."²²⁶ Students in China can find libraries, research centers, and computer centers filled with unauthorized copies of foreign works and software.²²⁷ Consumers in China may avail themselves of pirated editions of foreign works in state-owned bookstores unavailable to foreigners.²²⁸ Domestic piracy exists as well, and Chinese pharmaceutical manufacturers have found their marks infringed.²²⁹ Den Xiaoping's daughter successfully brought a copyright infringement case against

221. Endeshaw, *supra* note 193, at 326.

222. *See id.*

223. *See id.*

224. *See id.* at 331.

225. *See* Latman, *supra* note 209, at 7.

226. ALFORD, *supra* note 50, at 86.

227. *See id.*

228. *See id.*

229. *See id.* at 87.

an infringer of her biography of her father.²³⁰ Infringement is rampant in China, and administrative and formal legal redress for copyright infringement is difficult to secure.²³¹ To combat the problem in 1994, the Standing Committee of the NPC adopted legislation imposing substantial criminal penalties for copyright infringement while the State Council issued a White Paper praising progress over the past decade on intellectual property.²³² This legislation resulted in the death penalty of four individuals, life sentences for five others, and imprisonment of some 500 more for trademark violations.²³³ But major problems in intellectual property piracy still persist.

Approximately twenty-five percent of American exports consist of intellectual property.²³⁴ Chinese piracy of American goods has been reported to cause a \$1 billion-plus loss to United States businesses.²³⁵ The American computer corporation Microsoft has reportedly lost up to \$30 million due to rampant piracy in China.²³⁶ Chinese piracy continues fairly unabated, and massive quantities of pirated goods show up in United States ports.²³⁷ Chinese officials reportedly seized 1.89 million CDs, 752,000 videos and audio cassettes, 37,000 software programs and 450,000 published works.²³⁸ Experts estimate that 95 percent of the software in use in China consists of unauthorized copies.²³⁹ Eric Smith, President of the International Intellectual Property Alliance, estimated that 28 to 35 Chinese plants continue to manufacture counterfeit CDs.²⁴⁰ In June 1994, USTR Mickey Kantor stated that enforcement of copyright law in China is "virtually non-existent."²⁴¹

Estimated United States losses in 1995 due to copyright piracy in general topped \$14 billion.²⁴² These estimates cover

230. See *id.* at 88.

231. See *id.*

232. See *id.* at 91.

233. See *id.* at 92.

234. See *id.* at 178 (citing John T. Masterson, *Protection of Intellectual Property Rights in International Transactions*, 863 PLI CORP. 33 (1994)).

235. Prohaska, *supra* note 212, at 177.

236. See *id.*

237. See *id.* at 179.

238. See *id.*

239. ALFORD, *supra* note 50, at 91.

240. See Prohaska, *supra* note 212, at 179.

241. See ALFORD, *supra* note 50, at 91.

242. *Copyright Piracy Losses Top \$14 Billion, IIPA Estimates*, 11 World Intell. Prop. Rep. (BNA) 77, at 94 (Mar. 1997) (announcing results of an industry survey by the International Intellectual Property Alliance released on February 7, 1995) [hereinafter *\$14 Billion*].

losses due to inadequate copyright laws and enforcement incurred by American authors, producers, and distributors of software products, movies, television programs and home videos, music and sound recordings, and books, reference works, journals, and similar publications. In 1995, the International Intellectual Property Alliance identified China as the country where American copyright industries suffered the greatest loss. Total software losses in China topped \$2.3 billion in 1995, more than double the losses experienced in any other overseas market.²⁴³

2. *Chinese Efforts to Combat Piracy.* Since the 1995 MOU was signed, the Chinese government claims it conducted "3,000 raids, destroyed 2 million pirated compact discs and laser discs, 700,000 pirated videos, and 400,000 pirated books and began over 1,000 possible criminal copyright infringement cases."²⁴⁴ During 1995, China investigated twenty-nine CD factories known as infringers on US copyrights. But as soon as the factories were closed during the investigation, the Chinese government relicensed all but one of these CD factories.²⁴⁵

Recently, on January 21, 1997, government authorities reported that China would introduce new anti-piracy legislation as part of a renewed campaign to curb copyright theft.²⁴⁶ Officials claim to have achieved remarkable success in closing underground CD factories after posting cash rewards for information leading to the arrest of black market operators.²⁴⁷ Authorities in South China's Guangdong province, the center of the nation's bootleg trade in pirated disks and software, said twenty-nine black market factories had been closed as of January 15, 1997 following a month-long special enforcement period.²⁴⁸

Recently, China has stepped up its intellectual property protection in the courts. In the first ten months of 1996 Chinese courts heard 341 cases concerning copyrights, representing a

243. See *id.*

244. See Barshefsky, *supra* note 49.

245. See *id.*

246. *China to Revise Copyright Law to Meet International Standards*, *supra* note 183, at 81.

247. See *id.* at 82. In commenting about China, U.S.T.R. Charlene Barshefsky said that China has "begun to take meaningful, serious action to halt CD export piracy since a June 1996 agreement [was signed]. Close to 40 underground production facilities have been closed, over 250 people have been arrested with resulting jail sentences being handed down At the same time, pirate production of CDs . . . continues to be a serious problem." *Problems Remain in China*, 11 World Intell. Prop. Rep. (BNA) 181, at 197 (June 1997) (internal quotations omitted).

248. See *id.*

6.2% increase from 1995.²⁴⁹

3. *China's Inability to Enforce Anti-Piracy Agreements.* The difficulty in reducing or deterring piracy in China is linked, but not limited, to economic advantage. Pirating in China is too profitable a business, and if stopped, may even detract from the growth of the booming Chinese economy.²⁵⁰ Chinese citizens stand to lose money and jobs if their government were to enforce and comply with its agreements with the United States regarding copyright and trade.²⁵¹ Some central government agencies, province officials, and other local Chinese government officials are allegedly connected to the pirating.²⁵² It appears that Chinese officials have a vested interest in seeing China's pirating industry succeed. Moreover, China's overt and covert trade practices discourage imports of the very products which the Chinese need. Decreased supply encourages the Chinese to resort to bootlegging and pirating to meet the market demand.

In November 1996, experts reported that piracy was rampant in Asia, especially in China and India, where entrepreneurs reportedly install technology to receive broadcasts and then retransmit them to entire neighborhoods.²⁵³

The failure to reduce or eradicate piracy of intellectual property in China is also due to the serious misperceptions of the very notion of ownership by the Chinese people and by their government leaders. It is more than likely that people do not perceive copying a CD as an illegal act, for they do not understand the very nature of the ownership of a copyright or possession of a proprietary interest in property. For many years before and even after the 1979 transition to a market economy, China had adopted a socialist ideology which inculcates state ownership of the means of production and discourages private ownership of property. To some people in communist countries owning

249. *Chinese Courts To Step Up IP Protection Efforts*, available in 1997 WL 8487 (1997) (citing Xinhua English Newswire of Jan. 9, 1997).

250. Latman, *supra* note 209, at 8.

251. *The U.S.-China Intellectual Property Rights Agreement and Related Trade Issues*, 1996: Joint Hearing before the Subcomm. on International Economic Policy and Trade and Asia and the Pacific of the Comm. on International Relations House of Representatives and the Subcomm. on East Asian and Pacific Affairs of the Senate Comm. on Foreign Relations, 104th Cong. 57 (1996) (statement of Jason S. Berman, Chairman and CEO of Recording Industry Association of America).

252. Latman, *supra* note 209, at 8.

253. *Asian Broadcasters Call for Tough Copyright Laws to Prevent Piracy*, available in 1996 WL 649540 (1996) (citing *Global Broadcasters Urge Stiff Copyright Laws to Prevent Abuse*, Agence France-Presse, Nov. 7, 1996).

property is tantamount to a sin. Thus, stealing an object that is owned by someone else is less corrupt than owning it outright yourself. The lack of supply of goods in China resulted in theft, bribery, graft, corruption and a never ending search for devious means to go around the system as a way of survival. The Chinese proverb "To steal a book is an elegant offense" gives insight into the mentality of the Chinese toward intellectual property piracy. Moreover, a general lack of faith in the legal system in China makes piracy an especially difficult crime to deter.

H. *Effect of China's Pirating of Intellectual Property on Trade*

Without the incentive for enforcement of its intellectual property laws and agreements, China is unlikely to conform to international standards regarding intellectual property set forth by the WTO.²⁵⁴ China needs support for entry into the WTO, due to China's withdrawal from the General Agreement on Tariffs and Trade in 1949.²⁵⁵ The European Union Commission wants China to enter the WTO, but still has concerns regarding China's internal barriers to trade and China's unwillingness to adhere to minimum rules of trade etiquette.²⁵⁶

I. *China's Unfair Trade Practices which Impact on Piracy*

Recently, China has run a huge trade surplus with the United States which arose after Tiananmen Square and during the 1991-1992 recession.²⁵⁷ The surplus stems from several factors including unfair trade practices. Ambassador Hummel explained it by saying, "China is trying to export like a capitalist and import like a communist."²⁵⁸

China seeks liberal access to foreign markets but limits access to its own market by restricting the availability of foreign exchange for imports; by subsidizing exports; by using secret rules to manage imports; and by engaging in a host of non-tariff barriers which impede import trade.²⁵⁹ China fails to publish many secret rules which hinder trade. They maintain quotas and import controls on certain products. They keep tariffs on imports at a high level. They do not publish market information.

254. Latman, *supra* note 209, at 9.

255. GATT, *supra* note 11.

256. *Trade and Politics: EU Hails U.S.-China Pact on Intellectual Property*, WALL ST. J. EUR., Feb. 28, 1995, at 2.

257. Overholt, *supra* note 18, at 381.

258. *See id.*

259. *See id.*

They engage in import substitution measures which discourage imports. They have certain safety and health restrictions which are not justified by scientific evidence and which prevent imports.²⁶⁰ "The Chinese government promotes official and unofficial policies that fly in the face of . . . US-China trade agreements regarding market access"²⁶¹ China restricts trade with the United States by using informal quotas, slow censorship approval, and complete disapproval of goods which fail to meet formal censorship requirements.²⁶² China's use of quotas, its slow approvals and outright disapprovals, limit the quantities of American products that can enter China. China also utilizes prohibitively high taxation and tariff rates to limit American imports and sales in China.²⁶³ Recently, China imposed a fifty percent royalty tax on the published tariff rate for sound recordings and video cassettes in order to limit imports.²⁶⁴

While Chinese unfair trade practices have contributed to a decrease in imports from the United States, American practice has also contributed to its own trade deficit with China. Sanctions threatened or imposed by the United States on China have been an important factor in the decrease in American imports to China. China is less inclined to open its door to United States products because of continuous threats by the United States of trade sanctions under Super and Special 301 Proceedings,²⁶⁵ threats to remove China's Most-Favored-Nation trade status, and caveats to refuse China's entry into the WTO. Since American export credits are not as generous as those of other nations, many of the biggest deals in China go to non-American companies.²⁶⁶ In addition, many Chinese exports originate from American companies manufacturing products more cheaply in China and exporting them to other places, including the United States. This helps American companies compete globally, but it leads to a surge of exports from China back into the United States.²⁶⁷ Each of these factors contributes to a decrease in imports of American products, especially high-technology products which

260. *See id.* at 389.

261. Latman, *supra* note 209, at 10.

262. *See id.*

263. *See id.*

264. *See id.* at 10-11.

265. Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411-20 (1994) [hereinafter Section 301]. *See also infra* text accompanying notes 267-82, (discussing Section 301 and Super 301).

266. OVERHOLT, *supra* note 18, at 381-82.

267. *See id.* at 382.

are easily pirated, a practice which results in encouraged bootlegging and piracy.

J. *United States Remedies for Chinese Piracy*

1. *Section 301.* Section 301 of the Trade Act of 1974²⁶⁸ arose from the need perceived by the United States to strike back against unfair trade practices that were not enforced by GATT panel condemnation.²⁶⁹ Section 301 permits the United States Trade Representative (USTR) to investigate and impose sanctions on countries whose trade practices are found to be unfair to American interests. Reaching beyond the GATT, Section 301 gives the United States unilateral power to penalize countries that threaten American interests.²⁷⁰ Section 301 is used to enforce United States' rights under multilateral and bilateral trade agreements, as well as, to remedy unreasonable, unjustifiable or discriminatory foreign trade practices that restrict or burden United States trade.²⁷¹ Section 301 contains both mandatory and discretionary provisions and specific timetables for actions by the USTR.

Section 301 was designed to give the President of the United States great flexibility in resolving trade disputes.²⁷² An amendment to Section 301 of the Omnibus Trade and Competitiveness Act of 1988²⁷³ transferred final decision-making authority in Section 301 cases from the President to the USTR.

The United States has used Section 301 with increasing frequency to impose sanctions on countries whose trade practices it does not like. For example, since 1974 ninety-eight cases have been investigated under Section 301.²⁷⁴ While Section 301 has empowered the United States to take action in trade disputes, the implementation of Section 301 has resulted in negative world opinion and retaliatory trade sanctions by the European Union and Asia.²⁷⁵

268. Section 301, *supra* note 265.

269. A. Lynne Puckett, *Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?* 90 AM. J. INT'L L. 675, 687 (1996).

270. *See id.*

271. 271 Section 301, *supra* note 265, § 2411(d)(4)(A).

272. Puckett, *supra* note 269, at 676.

273. Trade Act of 1988, *supra* note 14, § 1301(a) (transferring the authority to the United States Trade Representative subject to the direction, if any, from the President).

274. Puckett, *supra* note 269, at 675.

275. *See, e.g.,* Puckett, *supra* note 269, at n.11; Tom Buerkle, *EU Blasts U.S. Tariffs on Japanese Automobiles*, INT'L HERALD TRIB., May 18, 1995, at 1 (criticizing Sir Leon Brittan, Commissioner for Trade of the European Union); David E. Sanger, *United States Finds Itself Virtually Alone in Japan Trade*, N.Y. TIMES, May 29, 1995, at A1 (crit-

2. *Special 301 and Super 301.* The Trade Act of 1988 added two specific categories of Section 301 actions. "Special 301" is designed to protect foreign intellectual property rights in developing countries and to increase American bargaining power in international trade negotiations.²⁷⁶ "Super 301" requires the USTR to identify and investigate "priority practices" of foreign governments that significantly affect American trade.²⁷⁷

Special 301, which is a subset of Super 301,²⁷⁸ requires the USTR to identify countries that do not protect intellectual property rights. Countries whose policies adversely affect the United States must be identified as "priority foreign countries" and investigated. The USTR is to select countries with the most egregious practices of denying "adequate and effective protection of intellectual property rights."²⁷⁹ The USTR threatened China with a Special 301 in 1995. As a result of a Special 301 investigation and an agreement on enforcement entered into in June, 1996, China has begun to take serious action to halt CD export piracy. The United States government will continue to monitor China's implementation of the 1995 and 1996 enforcement agreements as set forth in Section 306 of The Trade Act of 1988. The USTR recently announced the steepest tariffs in the history of Section 301—one-hundred percent tariffs on \$1.08 billion of Chinese imports, in an effort to make the Chinese comply with intellectual property laws.²⁸⁰

Super 301 requires the identification of priority practices that pose major barriers to trade and whose elimination will significantly benefit the United States.²⁸¹ Six Super 301 cases have been investigated by the USTR. The USTR threatened a Super 301 investigation against China in 1991. Super 301 is a dangerous provision because it further entrenches the practice of maintaining lists of unfair trade practices quantified in terms of arbitrary estimates of impact.²⁸² This provision expired under

icizing Asian leaders).

276. Amy E. Simpson, *Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade?* 20 N.C.J. INT'L L. & COM. REG. 575 (1988).

277. See 19 U.S.C. § 2242(a)(1)(A) (containing the Special 301 provisions); 19 U.S.C. § 2420(a)(1)(A) & (B) (as amended) (containing the Super 301 provisions).

278. Simpson, *supra* note 276.

279. 19 U.S.C. § 2242(a)(1)(A).

280. Puckett, *supra* note 269, at 680. See also *Office of the U.S. Trade Representative's Fact Sheet on Special 301 Intellectual Property Lists, Released Apr. 30, 1997*, 11 World Intell. Prop. Rep. (BNA) 181, at 208 (June 1997).

281. 19 U.S.C. § 2420(a)(1)(A) & (B) (as amended).

282. Puckett, *supra* note 269, at 681.

President Bush, was reinstated by an executive order issued by President Clinton, but has slowly been phasing out.²⁸³

3. *Section 337 Procedures.* Section 337 of the Tariff Act of 1930²⁸⁴ allows holders of United States intellectual property rights to obtain expedited relief from the United States International Trade Commission (ITC) against imports which infringe upon these rights.²⁸⁵ The ITC estimated that the annual loss to the United States in intellectual property as a result of unfair trade practices was between \$43-\$71 billion.²⁸⁶ Section 337 relief is not available to those injured by domestic infringers. Since the burden of Section 337 falls mainly on foreign producers, the separate treatment of Section 337, like the Section 301 sanctions which encourage unilateral action, seem to run afoul of the GATT requirements. Section 337 has been the target of litigation both in the federal courts and in the dispute resolution mechanism of the GATT.²⁸⁷

4. *WTO, Section 301, TRIPS and China.* Recognizing that the GATT lacked enforcement power, the United States sought to improve, strengthen, and increase the transparency of the GATT dispute settlement procedures and to ensure that all the Uruguay Round Agreements were subject to a single effective dispute settlement system which the World Trade Organization (WTO) provided.²⁸⁸ The WTO, which was created on January 1, 1995 and is housed in Geneva, may emerge as the real force shaping world trade. The legislation implementing the WTO did not limit the broad sweep of Section 301, and the legislative history of the implementing statute is clear in this respect.²⁸⁹ While some argue that Section 301 is outside the WTO, others argue that Congress did not intend the WTO dispute resolution process to displace the unilateral power vested in the USTR by Section 301.

The strength of the WTO will depend on its leadership and on the political pressures driving national positions which must be balanced against fairness in WTO decision making. The dis-

283. See *id.* at 680-681.

284. 19 U.S.C. § 1337 (1930).

285. Ernest P. Shriver, *Separate But Equal: Intellectual Property Importation and the Recent Amendments to Section 337*, 5 MINN. J. GLOBAL TRADE 441 (1996).

286. See *id.* at 442.

287. See *id.*

288. Puckett, *supra* note 269, at 688.

289. See *id.*

pute resolution mechanism of the WTO, which still maintains the power by one nation to block a recommendation, is composed of nations with a common view toward the benefit of free trade. However, these same nations have opposing views, policies and needs. In seeking to make the WTO the arbiter of world trade by reducing divergent interests within the organization, the United States may wish to move away from the use of Section 301 in order to better act out its role as a team player. However, a decision by the United States not to enact Section 301 sanctions would be at the risk of losing its unilateral power over a country like China whose piracy of intellectual property is rampant and difficult to police.

All member nations of the WTO accept all the same rights and responsibilities of the agreement. As such, a member nation must comply with the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) of GATT.²⁹⁰ TRIPS creates uniform laws of intellectual property, and each member nation must protect the copyrights of foreign nationals of other WTO countries, no less favorably than the copyrights of their own nationals.²⁹¹ However, developing nations or "less developed countries" (LDCs) have five years from admittance into the WTO before they have to adopt, implement and enforce the laws in compliance with TRIPS.²⁹²

China is currently lobbying the 111 members of the WTO to be admitted in the organization as a member in the category of a LDC. However, entrance into the WTO as an LDC would allow China to continue its trade policy of export-led growth and protectionism for at least another five years. The five-year waiting period for implementation and enforcement of the TRIPS agreement would also dissuade China from taking a more aggressive role in the eradication of its pirating of intellectual property. These factors discourage the United States from allowing China's accession into the WTO.

The WTO's Dispute Settlement Understanding (DSU)²⁹³ is a multilateral approach to obtain a dispute settlement and implies that one member nation should not use unilateral sanctions against an other WTO nation without first going through the

290. Latman, *supra* note 209, at 12.

291. *See id.*

292. *See id.* at 13.

293. *See* Richard O. Cunningham, *Dispute Settlement in the WTO: Did We Get What the United States Wants Or Did We Give Up The Only Remedy That Really Worked?* at 549 (PLI Com. L. & Prac. Course Handbook Series No. 722, 1995).

WTO dispute settlement mechanism.²⁹⁴ Between the United States and the rest of the WTO community there is a debate as to whether the United States can unilaterally use its Section 301 sanctions including Special 301 and Super 301 to gain leverage over an offending WTO member nation.²⁹⁵ During the last round of GATT talks in Uruguay, the member nations of GATT claimed that the United States' use of Section 301 sanctions against a member nation is inconsistent with its obligations under GATT and, therefore, violates the GATT agreement.²⁹⁶ With respect to the WTO, use by the United States of its Section 301 sanctions could result in Dispute Settlement Understanding-authorized counter retaliations.²⁹⁷

The Clinton Administration believes that "there is no basis for concern that the . . . Dispute Settlement Understanding will make future [United States] Administrations more reluctant to apply Section 301 sanctions that may be inconsistent with United States trade obligations because such sanctions could engender DSU-authorized counter retaliations."²⁹⁸ Nevertheless, the fear of risking DSU-authorized counter retaliation motivated the United States' decision not to enact Section 301 sanctions against Japan in a recent trade dispute regarding Japan's failure to open its borders to American manufactured auto parts.²⁹⁹

K. *United States' Trade with China*

The American big stick policy toward China may be part of the very problem it seeks to solve: the piracy of intellectual property. Refusal by China to buy American products encourages bootlegging and piracy in China and elsewhere. The United States currently has a \$3.7 billion trade deficit with China for March 1997, compared with \$2.7 billion a year ago.³⁰⁰ This trade deficit puts further pressure on the Clinton Administration to force China into lowering a vast array of trade barriers precisely at the time that the issue of China's entry into the WTO is being negotiated in Geneva.³⁰¹ The United States is plagued with the dilemma of whether to take a hard line on market access is-

294. *See id.* at 4-7.

295. *See id.* at 2.

296. *See id.* at 7.

297. *See id.*

298. *See id.*

299. Cunningham, *supra* note 293, at 9-11.

300. David E. Sanger, *Trade Gap Grows, Complicating Visit By Gore to Beijing*, N.Y. TIMES, Mar. 21, 1997, at A1.

301. *See id.*

sues or rather to appear to soften on Chinese trade issues on the theory that exports and economic engagement with China are sustaining high-paying jobs in the United States. While the United States just signed a \$1 billion dollar Boeing aircraft deal with China, as well as a General Motors contract in March 1997, the Administration continues to waver on trade policy issues.³⁰²

It is common knowledge that the United States simply cannot afford to alienate either China or Russia. China's economic success story, which is due no doubt to the additive effect of the economic successes of Hong Kong, Taiwan, South Korea, Thailand and Singapore,³⁰³ is very different from the sad tale of Russia's economic decline. American trade relations with Asia have always been coupled with misperceptions because Americans know less about Asia than they do about Europe and Canada.³⁰⁴ Misperceptions about China derive from faulty analogies of China with the former Soviet Union,³⁰⁵ and more recently with the dramatic image of Tiananmen Square and China's continued practice of human rights violations.³⁰⁶

The United States needs to demystify China, which was once thought of as an impoverished communist nation and which, when and if it begins to succeed economically, could become the next aggressor nation, a new Cold War enemy.³⁰⁷ This myth must be dispelled and attempts must be made to create more understanding and appreciation for the Chinese nation. Americans must respect China's differences and must understand the source of its views toward intellectual property which reflect years of communist ideology where ownership of private

302. *See id.*

303. Overholt, *supra* note 18, at 333-35.

304. *See id.* at 400.

305. 305 *Russia, not China, Ought to be the Focus of American Policy*, INT'L HERALD TRIB., Mar. 21, 1997, at 10 ("The conventional wisdom now has it that China will be the superpower of the 21st century, ready and able to challenge the United States, while Russia will indefinitely remain in political disarray and economic anarchy.")

306. William Pfaff, *Again We Overestimate Chinese Strength*, INT'L HERALD TRIB., Nov. 6, 1993, at 6 ("Modern China had virtually no active influence on international society until the 1950's and 1960's as a result of China's industrial advances and the Vietnam War.")

307. *See* Richard Bernstein & Ross H. Munro, *China I: The Coming Conflict with America*, FOREIGN AFF., Mar.-Apr. 1997, at 18 (espousing the view that America's number one objective in Asia must be to derail China's quest to become a 21st-century hegemony); Robert S. Ross, *China II: Beijing as a Conservative Power*, FOREIGN AFF., Mar.-Apr. 1997, at 33 (espousing the opposite point of view that there is no "China threat," not because China is a benign giant but because it is too weak to challenge the balance of power).

property was considered a sin. China's more distant history reflects a reverence for the past and a practice of legitimized copying. China's attempts to reeducate its people and to enforce its domestic intellectual property laws, as well as its international trade agreements affecting intellectual property should be viewed as a positive sign worthy of American positive reinforcement. Continued threats of Section 301 sanctions do not create a climate of positive reinforcement for U.S.-Chinese trade.

II. RUSSIA

A. *History of Intellectual Property Laws in Russia and Russian Compliance with International Intellectual Property Conventions*

The history and development of intellectual property laws in Russia reflect its political ideology. The very notion of ownership of private property, which is at the heart of intellectual property legislation, is anathema to socialist ideology. In 1936, Soviet rulers proclaimed the definition of socialism as "the eradication of private ownership of the means of production and of the exploitation of man by man that private property entails."³⁰⁸ Thus, Soviet leaders dispensed with intellectual property law as it is known in market systems, and instead created special well-funded research institutes for the development of new scientific and industrial techniques.³⁰⁹ While Soviet scientists were considered privileged members of their society, the scientists had no economic stake in the exploitation of their inventions.³¹⁰ Although Soviet science produced many extraordinary achievements, in some areas surpassing Western scientific achievements, Soviet industry grew increasingly backward.³¹¹

The Soviet legislature conceived and implemented copyright law in the Soviet Union to advance its socialist ideology which was fundamentally opposed to private ownership of property. But Soviet laws were inconsistent with the goals of post-Soviet Russia and its new direction toward the adoption of a market economy.³¹²

308. Paul B. Stephan III, *The Fall—Understanding the Collapse of the Soviet System*, 29 SUFFOLK U. L. REV. 17, 18 (1995) (citing Konst. S.S.S.R. Arts. 1-12 (1936)).

309. See *id.* at 32.

310. See *id.*

311. See *id.* at 33.

312. Lana C. Fleishman, *The Empire Strikes Back: The Influence of The United States Motion Picture Industry on Russian Copyright Law*, 26 CORNELL INT'L L.J. 189

Intellectual property legislation dates back to the time of Tzar Nicholas II. Imperialist Russia enacted its first uniform copyright law in 1911.³¹³ The USSR refused to become a member of the Berne Union and did not sign the Berne Convention until 1990. Following the overthrow of the imperialist government in 1917, the Bolshevik regime passed new copyright legislation aiming to eradicate any principle of free market from the copyright laws of Russia.³¹⁴ The 1917 Decree gave the Soviet government a monopoly for a five-year period over the classic works of pre-Soviet famous authors who were already deceased. In 1918, this Decree was extended to provide the Soviet government with a five-year monopoly over the works of living authors.³¹⁵

The Soviet government enacted the Fundamental Principles of Civil Legislation (Copyright Law) in 1925 which was adopted almost verbatim by the Soviet Republics in their own statutes.³¹⁶ Early domestic Soviet copyright law was incorporated in the 1925 Fundamental Principles of Civil Legislation,³¹⁷ the republican Civil Code,³¹⁸ and in many other legislative decrees,³¹⁹ as well as the Russian Constitution of 1977 which guaranteed Soviet citizens freedom of scientific and artistic creation "in accordance with the goals of communist construction."³²⁰

The 1925 Soviet copyright law remained unchanged until 1961 when Article 98 of the Fundamental Principles was amended to add personal non-property rights of the author. However, the personal rights of the author were not the exclusive rights of the author, since property ownership, according to the Soviet government, did not fit into a socialist system.³²¹ In theory, the Soviet copyright system provided protection for the author's rights of authorship and rights of integrity. But in practice the author's right of authorship could only be defended where the offender failed to mention the author's real name or pseudonym.³²² While theoretically the Soviet author could demand that all mutilated copies of his work, such as a bad trans-

(1993).

313. Bella Karakis, *Moral Rights: French, United States, and Soviet Compliance With Article 6bis of the Berne Convention*, 5 *TOURO INT'L L. REV.*, 105, at 131 (1994).

314. *See id.* at 132.

315. *See id.*

316. *See id.*

317. Fleishman, *supra* note 312, at 192 (citing Art. 96-106).

318. *See id.* (citing Art. 475-516).

319. *See id.* at n.9.

320. *See id.* at 192.

321. Karakis, *supra* note 313, at 133.

322. *See id.*

lation, be withdrawn from publication, in practice not one single case of such a claim was reported in the Soviet system.³²³

The Soviet copyright laws were politically motivated and designed to provide favorable conditions for the creation of art, literature, and science of high, ideological quality that promoted the socialist philosophy.³²⁴ Thus, in 1918, a government decree declared that all scientific, literary, musical, and artistic works were the property of the government.³²⁵

In accordance with the view of copyright as a union of the interests of both the author and society, the Soviet government reserved powers to utilize the author's work when necessary to further the interests of society as a whole.³²⁶ The government had free use of the author's work without his consent and without payment of royalties to the author.³²⁷

When the Soviets joined the Universal Copyright Convention in 1973, sixty years of isolationism in the Soviet Union were ended. USSR's accession to the Universal Copyright Convention in 1973 reduced the free use by the government of the author's work. The Soviet Union also engaged in the practice of issuing compulsory licenses to provide the author with royalties for the government's free use of his work.³²⁸ In 1973, the Soviet legislature abolished the free use of translation in order to allow the Soviet Union to join the Universal Copyright Convention.³²⁹ USSR's accession to the Universal Copyright Convention allowed the payment of royalties for reproduction of foreign author's works.³³⁰ However, its accession to the Universal Copyright Convention did not prevent continued piracy activity in the Soviet Union.³³¹

The Soviet economy was based on government ownership of the means of production which allowed the Soviet government to carry out the planned development of the Union. Publishing houses, movie theaters, radio, television, theaters, and film studios were the property of the Soviet government and were under

323. *See id.*

324. Fleishman, *supra* note 312, at 192.

325. *See id.* at 193.

326. *See id.* at 195.

327. *See id.* at 196.

328. *See id.*

329. *See id.*

330. Brad Swenson, *Intellectual Property Protection Through the Berne Convention: A Matter of Economic Survival for the Post-Soviet New Commonwealth of Independent States*, 21 DENV. J. INT'L L. & POL'Y 77, 89 (1992).

331. *See id.*

the management of the "Socialist User Organizations."³³² The Socialist User Organization was the official censorship organ of the government. An author realized his personal rights of publication, reproduction, and distribution only upon signing a contract with a socialist user organization which linked its approval of an author's work directly to the work's ideological content or social value.³³³ The Soviet author who wished to disseminate potentially offensive literature circumvented the Socialist User Organization through the process of *samizdat*, which was the underground press.³³⁴ While *samizdat* was not expressly forbidden, Articles 70 and 190-1 of the USSR Criminal Code permitted official interference by criminal prosecutions in almost all cases of *samizdat*.³³⁵

The artistically crippling effect of Soviet censorship and the harsh persecution of artists and writers remain legendary. Artistic freedom and the elimination of fear during the transition period following *Perestroika* and *Glasnost*, which effectuated the transformation of the Soviet centrally-planned economy to a more democratic/market economy, are primary reasons why the Russians are willing to endure severe economic hardships wrought by this radical transition.³³⁶

Remedies for copyright infringement were hard to obtain in the Soviet courts, and some people took redress under administrative law.³³⁷ The unworkable and antiquated regime of Soviet copyright laws invited piracy and discouraged creativity.

Despite the obvious inadequacy of Soviet copyright legislation, its strength was in its expansive "personal" or "moral" rights provisions. Authors possess two kinds of rights: personal and property. Personal rights, known as moral rights, arise when the work is created, and property rights arise when the work is socially utilized.³³⁸ Personal rights consist of the right to be acknowledged as the author of the work (right of paternity),³³⁹ the right to have the work protected against improper

332. Fleishman, *supra* note 312, at 198.

333. *See id.*

334. *See id.*

335. *See id.*

336. The recent failure of a strike by unpaid Russian workers in March 1997 is a clear indication that the majority of the people are in favor of the transition to a market economy and are willing to endure economic hardship. It is primarily the minority older generation and the retirees who lost the most from this transition, leaving them disgruntled.

337. Fleishman, *supra* note 312, at 202.

338. *See id.* at 194.

339. Karakis, *supra* note 313, at 109.

changes or adaptations by others (right of integrity),³⁴⁰ and the right to have the work published or performed.³⁴¹ Comparing American and Soviet intellectual property legislation, it is interesting to note that American intellectual property legislation is weak with respect to personal rights and strong with respect to property rights. The Soviet moral rights protection was adopted early in the Soviet laws and expanded in the new 1961 All-Union Copyright Provision. The All-Union Copyright Provision was adopted in order to make the Soviet Union compliant with the 6bis provision of the Berne Convention.³⁴²

Although some aspects of Soviet law were compatible with the Berne Convention, others were not, and this incompatibility created a barrier to the USSR's and post-Soviet's accession to the Berne Convention.³⁴³ The Berne Convention extends the duration of protection for fifty years after the author's death, whereas the Soviet Union in its Fundamental Principles (1961) provided protection only for twenty-five years.³⁴⁴ The Soviet government's practice of free use and compulsory licensing were violative of the Berne Convention.³⁴⁵ The conflicts of law between federal and individual republics' copyright laws were contrary to the requirement in the Berne Convention of a unified Federal Copyright Act.³⁴⁶ The Soviet laws imposing formalities such as the appearance of the author's name, year of creation and place of publication on each print of a work were in direct conflict with the Berne Convention.³⁴⁷ Moreover, the practice by the Socialist User Organizations of demanding changes in an author's work and of preventing performance and dissemination of the work for noncompliance violated the Berne Convention's rights to authorship, public performance, and other guaranteed minimum rights.³⁴⁸

The Soviet accession in 1973 to the Universal Copyright Convention (UCC), which was designed to lead to a single system of international copyright protection for the entire world,³⁴⁹ did not significantly upgrade its copyright protection to make it

340. *See id.*

341. Fleishman, *supra* note 312, at 194.

342. Karakis, *supra* note 313, at 134.

343. Fleishman, *supra* note 312, at 207.

344. *See id.* at 206-207.

345. *See id.* at 207.

346. *See id.*

347. *See id.*

348. *See id.* at 208.

349. *See id.*

compliant with the Berne Convention.³⁵⁰ The UCC accords copyright protection to the author for only twenty-five years after the author's death. To comply with the UCC, the Soviet legislature extended its grant of protection from fifteen to twenty-five years after the death of the author.³⁵¹

The Soviet legislature significantly altered its copyright laws in order to join the Universal Copyright Convention, including the creation of the VAAP (the All-Union State Agency for Copyright and Related Rights). The VAAP represented the unions of writers, artists, composers, and journalists, and the Ministry of Trade. The real purpose and effect of the VAAP was to prevent publication of works by Soviet dissidents.³⁵²

The effects of Soviet copyright law on foreign authors were grievous. To determine the scope of a foreign author's copyright, the deciding factor was where the work was first produced in tangible form.³⁵³ The foreign author had a recognized copyright under applicable Soviet law if the work was published originally within the territories of the USSR.³⁵⁴ The foreign author had a recognized copyright in the USSR for a work published for the first time abroad in accordance with international agreements to which the Soviet Union was a party.³⁵⁵ Thus, in the absence of an international or bilateral agreement to which both the Soviet Union and the author's country of citizenship belonged, the work of the foreign author had no copyright protection at all, and neither the foreign author nor his heirs had the right to demand payment for the dissemination of the author's work in the territory of the Soviet Union if the work was originally published in the territory of a foreign country.³⁵⁶ Foreign authors were forced to sign a contract with the VAAP which could then block importation of any materials which it deemed to have an anti-Soviet tone.³⁵⁷

The United States demanded that the Soviets correct the inadequate protection their copyright system afforded to the works of United States nationals. In response to American pressure and in an attempt harmonize its intellectual property legislation with the European Community, the Soviet Union declared its in-

350. *See id.*

351. *See id.*

352. *See id.*

353. *See id.* at 210.

354. *See id.*

355. *See id.*

356. *See id.* at 211.

357. Fleishman, *supra* note 312, at 211.

tent to adhere to the Berne Convention in 1990.³⁵⁸ Russia actually did join in 1995.

The Soviet Union collapsed in 1991, and on December 8, 1991 the Commonwealth of Independent States was formed. While international treaty obligations would continue to be honored, all Soviet domestic law was threatened with extinction.³⁵⁹ A large proportion of Soviet-era legislation still remains in effect today, but a new legal system is being formed. The formation of a new intellectual property infrastructure is clearly an important objective of the Russian Federation,³⁶⁰ but it is equally important to encourage the independent republics to adhere to international conventions and to adapt their domestic laws to conform to international standards.³⁶¹

As part of this renovation of the intellectual property infrastructure, on February 24, 1992 President Yeltsin formed a Russian Agency for Intellectual Property under the President of the Russian Federation (RAIS), which replaced the infamous VAAP. The purpose of RAIS was to reform the orientation and structure of socialist copyright law. RAIS was thereafter replaced by RAO (The Russian Authors' Society).

Since 1992, after the ratification of a 1990 Trade Agreement between the United States and the Russian Federation, five new intellectual property laws were enacted in Russia in order to comply with international standards of intellectual property protection. A new Criminal code was enacted which provides for criminal action in the event of piracy of intellectual property.

B. *New Trademark Law*

On September 23, 1992, the Russian Parliament passed the law On Trademarks, Registered Servicemarks, and Designations of Place of Origin of Products³⁶² (1992 Trademark Law). It was enacted on October 14, 1992 with the new laws on patents, integrated circuits, computer programs and data bases, as part of a

358. Karakis, *supra* note 313, at 133. See also Michiel Elst, *The Interaction of European Community and Russian Copyright Law: A Matter of Partnership and Cooperation*, 22 REV. C. & E. EUR. L. 267, 283-84 (1996).

359. Brad Swensen, *Intellectual Property Protection Through the Berne Convention: A Matter of Economic Survival For the Post-Soviet New Commonwealth of Independent States*, 21 DENV. J. INT'L L. & POL'Y. 77, n.140 (1992).

360. Fleishman, *supra* note 312, at 234.

361. See *id.* at 233.

362. Peter B. Maggs, *New Russian Intellectual Property Legislation*, S.E.E.L., Nov. 1992, at 12 (citing the Law on Trademarks, Service Marks and Designations of Place of Origin of Goods, of Sept. 23, 1992, Ross. Gazeta, 17 Oct., 1992).

comprehensive new system of intellectual property laws in the Russian Federation ("Russia").³⁶³

Like the former Trademark Law of July 3, 1991, the 1992 Trademark Law comports with the 1990 US-USSR Trade Agreement, and thus provides for Russia to implement a trademark law complying with Article 10 bis and Article 10 of the Paris Convention for the Protection of Industrial Property.³⁶⁴

The 1992 Trademark Law addresses issues of legal protection of trademarks, servicemarks, designations of origin, and collective marks; registration of marks and designations; use of marks and designations; and the transfer and termination of legal protection for marks.³⁶⁵ The 1992 Trademark Law grants protection for marks on the basis of their registration in accordance with the 1992 Trademark Law or by virtue of international agreements to which Russia is a party. Therefore, it is important to determine if the proposed mark is protected under an international agreement in the absence of a registration, and if the mark is registrable in Russia. It remains to be seen how much protection the 1992 Trademark Law will provide a mark that is registered in Russia or that is protectable pursuant to an international agreement. Russia is a party to the major international trademark conventions including the Paris Convention for the Protection of Intellectual Property. Not all marks are registrable under the 1992 Trademark Law. For example, this law will not allow registration of marks consisting only of designations which are generally accepted symbols and terms, or which denote the appearance, quality, quantity, characteristics, purpose and value of the goods, etc.³⁶⁶ The criteria for the registrability of a mark are basically consistent with the trademark legislation of other commercially important countries.³⁶⁷

Marks must be submitted to the State Patent Agency of the Russian Federation. The 1992 Trademark Law grants priority to foreign applicants who are members of the Paris Convention for the Protection of Industrial Property (including the United States) and who filed an application for the marks in their home country within six months immediately preceding the date of the application submitted to the State Patent Agency.³⁶⁸

363. Preston M. Torbert & Maciej "Matt" Orden, *New Trademark Law, EAST/WEST EXECUTIVE GUIDE*, Mar. 1993, at 23.

364. *See id.*

365. *See id.*

366. *See id.* at 24.

367. *See id.*

368. *Id.*

The 1992 Trademark Law represents a significant effort by the Russian authorities to improve intellectual property rights in Russia. The law itself is sufficient, but it remains to be seen whether the Russian authorities will have the resources and determination to enforce the law effectively.³⁶⁹

C. *New Patent Law*

Just before the demise of the Soviet Union, the Soviet Parliament on May 31, 1991 adopted a new set of Laws on Inventive Activity for the protection of patents.³⁷⁰ These new laws, based on a Western style system of reward for novel, non-obvious inventions with industrial applicability, were a mixture of the best patent systems of America, France and West Germany, but were still infused with the goals and ideals of the Soviet Union.³⁷¹ The new independent republics adopted these laws in 1992, but they were no doubt only temporary measures.

New substantive laws on the protection of patents were adopted in the fall of 1992.³⁷² The Russian Parliament passed a new Patent Law of September 23, 1992 which was enacted on October 14, 1992.³⁷³

Russia's patent agency, *Rospatent*, has replaced the USSR's *Gospatent*, and will carry on the administration and policy making with respect to patents within the Russian Federation.³⁷⁴ The Russian republic recognizes all patents issued under the USSR laws, and the republic will recognize the priority of patents filed under the USSR system and the new system.³⁷⁵

The Russian republic's new patent laws are similar to those of the European Patent Convention³⁷⁶ with two exceptions: computer programs and algorithms are exempted from protection. The new patent laws provide protection for a new use of a known arrangement, process substance or species of micro-

369. *See id.* at 25.

370. Laura A. Pitta, Comment, *Intellectual Property Laws in the Former Soviet Republics: A Time of Transition*, 8 SANTA CLARA COMPUTER & HIGH TECH. L.J. 499, 500 (1992).

371. *See id.*

372. Michael Newcity, *Law on Copyright and Neighboring Rights*, S.E.E.L., Oct. 1993, at 1.

373. Maggs, *supra* note 362, at 12 (citing the Patent Law of Sept. 23, 1992, Ross. Gazeta, 14 Oct., 1992).

374. Pitta, *supra* note 370, at 503.

375. *See id.*

376. *See id.* at n.17 (citing the Convention on the Grant of European Patents, Oct. 5, 1973, 13 I.L.M. 270).

organism.³⁷⁷

Attempts are being made to establish an interstate patent protection system within the CIS and an interstate patent office.³⁷⁸ The trend, however, is for each of the republics to establish its own intellectual property offices and laws.³⁷⁹ The United States negotiating team from the United States Patent and Trademark Office is encouraging the former Soviet republics to establish a uniform interstate system which could more efficiently make use of their limited resources³⁸⁰ and insure standardization of patent protection.

To implement the New Patent and Trademark Laws of 1992, the government of the Russian republic approved a Statute on Patent and Trademark Attorneys, authorizing them to register without having to take a new examination, if they had properly been registered under the USSR law.³⁸¹

D. *New Copyright Laws*

1. *Computer Program and Database Protection Law.* On May 14, 1992 the Russian Parliament passed a new law "On the Legal Protection of Computer Programs and Databases" (the Computer Program and Database Protection Law)³⁸² prohibiting the copying of software and providing for a mechanism to award damages.³⁸³ The Computer Program and Database Protection Law protects computer programs and databases on the basis of copyright. Computer programs are granted copyright protection as "works of literature," and databases are granted copyright protection as "collections."³⁸⁴ Copyright protection covers computer programs and databases from the moment of their creation throughout the life of the author and for a period of fifty years after the author's death.³⁸⁵ Like the Patent Law, the Computer Program Protection Law provides that computer programs and databases developed by an employee in connection with the performance of official duties or employment tasks are the prop-

377. See *id.* at 503.

378. See *id.*

379. See *id.*

380. See *id.*

381. John N. Hazard, *Statute on Patent Attorneys*, S.E.E.L., Apr. 1993, at 12 (citing 12 Feb., 1993, Sob. Actov Prezidenta, No. 7, item 573).

382. Catherine Mannick, *New Laws on Integrated Circuit, Computer Program and Database Protection*, EAST/WEST EXECUTIVE GUIDE, Mar. 1993, at 19.

383. Fleishman, *supra* note 312, at 235.

384. Mannick, *supra* note 382, at 21.

385. See *id.*

erty of the employer, unless otherwise agreed to in a contract.³⁸⁶ Copyright protection extends to computer programs and databases issued or situated on the territory of the Russian Federation regardless of the citizenship of the authors, their heirs or other legal successors and assignees.³⁸⁷ This new computer program law was drafted to conform to the European Commission Directive on Legal Protection of Computer Programs, adopted by the European Community in 1991.³⁸⁸

2. *Integrated Circuit Protection Law.* The new Russian law enacted on October 20, 1992, "On the Legal Protection of Topologies of Integrated Circuits" (the IC Protection Law), provides that intellectual property rights in topologies of integrated circuits are the inalienable personal rights of the authors of those topologies and are protected by law in perpetuity.³⁸⁹ Authors of topologies of integrated circuits may, but are not required to, register their topologies with the Russian Agency for Legal Protection of Computer Programs.³⁹⁰ Like the new Russian Patent Law, the IC Protection Law contains provisions regarding topologies of integrated circuits developed at the workplace, but unlike the Russian Patent Law, the Russian IC Protection law provides that rights to topologies of integrated circuits that are created by an employee in the course of performing the employee's obligations at the workplace or fulfilling tasks set by his or her employer, belong to such employee unless otherwise agreed to in a contract between the employee and the employer.³⁹¹ On the basis of international treaties to which the Russian Federation is a party or on the basis of reciprocity, foreign individuals and entities are granted the same rights as Russian citizens under the IC Protection Law.³⁹²

3. *Law on Copyright and Neighboring Rights.* After enacting the Computer Program and Database Protection Law, the Russian Supreme Soviet attempted broader copyright reform and passed a comprehensive Law on Copyright and Neighboring Rights on July 9, 1993. This law incorporates the Computer Program and Database Protection Law and gives greater protection

386. *See id.* at 22.

387. *See id.* at 23.

388. Fleishman, *supra* note 312, at 235.

389. Mannick, *supra* note 382, at 20.

390. *See id.*

391. *See id.* at 20.

392. *See id.* at 21.

to computer programs and databases.³⁹³ This new copyright law raised the level of protection offered to copyrights in Russia, and finally positioned Russia to join the Berne Convention by increasing protection for all internationally recognized forms of copyrightable works, by protecting software copyrights with more certainty, and by expanding the moral rights of the author.³⁹⁴ Russia's accession to the Berne Convention in December 1994 became effective in March 1995.

One of the reforms introduced by the Law on Copyright and Neighboring Rights allows copyright holders to establish independent nonprofit organizations for the purpose of managing and protecting their economic property rights.³⁹⁵ In order to effectuate this provision, President Yeltsin recognized the successor to RAIS, the Russian Authors' Society (RAO), which collects and distributes royalties to copyright owners and is managed by the authors themselves.³⁹⁶

The history of the Law on Copyright and Neighboring Rights is not without interest to human rights activists and those interested in anti-piracy efforts by the former Soviet Union. The new copyright law of July 9, 1993 is a revision of a law adopted by the Supreme Soviet in April 1993 which provided in Article 50 (3) that the police had the authority to freely enter the premises of any individual or entity at any time of day or night and search the premises and confiscate any copies, materials, equipment, objects or documents of suspected copyright pirates.³⁹⁷ President Yeltsin returned this law to the Supreme Soviet for reconsideration because he felt its implementation might lead to violations of human rights.³⁹⁸ Thereafter, Article 50(3) was deleted from the law, and several other minor changes were introduced.

The Law on Copyright and Neighboring Rights supersedes the copyright provision of the USSR Fundamentals of Civil Legislation, and this law, together with the Integrated Circuit Protection Law and the Computer Protection Law, both adopted in

393. Monica B. Vermeer, *A New Era in Russian Copyright Law: Protecting Computer Software in the Post-Soviet Russian Federation*, 5 *TRANSNAT'L. & CONTEMP. PROBS.* 147, 164-65 (1995).

394. *See id.* at 165.

395. *See id.* at 167. "President Yeltsin dissolved the state-run RAIS and legally recognized the Russian Authors' Society (RAO) as the successor to RAIS regarding property, financial resources, and contracts concluded under the former organization." *Id.*

396. *See id.*

397. Newcity, *supra* note 372, at 1. *See also* Igor Pozhitkov, *Copyright and Neighboring Rights Protection in the Russian Federation*, 20 *REV. C. & E. EUR. L.* 53 (1994).

398. *See* Newcity, *supra* note 372, at 1.

October 1992, and any legislation that may in the future be adopted by the republics within the Russian Federation, constitute Russia's legislation on copyright.

Under the Law on Copyright and Neighboring Rights, copyright commences upon the creation of a work, not after registration.³⁹⁹ The copyright proprietor may choose to mark each copy of the work with the standard copyright notice: the © symbol, the name of the copyright proprietor, and the year of first publication.⁴⁰⁰ Copyright protection lasts for the length of the author's life plus fifty years after his or her death.⁴⁰¹ Copyright extends to published and unpublished works that exist in some objective form within Russia, regardless of the citizenship of the authors or of their legal successors (heirs and assignees).⁴⁰² Foreign authors and publishers can protect their works in Russia even if they are not subject to protection under a treaty, if they arrange for the simultaneous publication of those works abroad and in Russia.⁴⁰³

Though in general the author has the exclusive right to the use of a work, nine articles of the Law on Copyright and Neighboring Rights are devoted to defining the circumstances under which a work can be used without the author's permission or without payment of royalties.⁴⁰⁴ For example, Article 18 provides that a previously published work may be reproduced for personal purposes without the permission of the author or the payment of royalties.⁴⁰⁵ As long as the author's name, the title of the work, and the source from which it is taken are cited, a work may be extensively used.⁴⁰⁶

Part III of the Law on Copyright and Neighboring Rights contains nine articles that define rights granted with respect to the use of sound recordings. Legal protection granted to recordings and broadcast programs has a duration of fifty years from the date of first performance or production of the work.⁴⁰⁷ Sound recordings may be used in some way without the permission of the recording artists or the producer, but the law provides a compulsory license (that is, free use but mandatory payment of

399. *See id.* at 2.

400. *See id.* (citing the Law on Copyright and Neighboring Rights, Art. 9(10)).

401. *See id.* at 7 (citing the Law on Copyright and Neighboring Rights, Art. 27(1)).

402. *See id.* (citing the Law on Copyright and Neighboring Rights, Art. 5(1)).

403. *See id.* (citing the Law on Copyright and Neighboring Rights at Art. 5(2)).

404. *See id.* at 8.

405. *See id.*

406. *See id.* at 9 (citing the Law on Copyright and Neighboring Rights at Art. 19).

407. *See id.* at 9 (citing the Law on Copyright and Neighboring Rights at Art. 43(1)).

royalties to author) for the public performance, broadcast or transmission by cable of a recording.⁴⁰⁸

The Law on Copyright and Neighboring Rights expands the court's power to impose penalties for infringement. For example, it adopts all the remedies listed in Article 18 of the Computer Program and Database Protection Law.⁴⁰⁹ Thus, illegal copies of copyrighted works may be seized.⁴¹⁰ Publication under one's own name of another's copyrighted work or unlawful reproduction or distribution of such products is punishable by criminal sanctions, but the Computer Program and Database Protection Law does not specify what these criminal sanctions are.⁴¹¹

Remedies under the Law on Copyright and Neighboring Rights include criminal sanctions as well as civil penalties. The new Russian Federal Criminal Code has a provision for penalties against copyright violations. Civil remedies include the right to demand recognition of one's ownership rights; the right to restoration of the situation that existed before the infringement of such rights; the right to cessation of activities infringing such rights or threatening infringement of those rights; the right to compensation for losses incurred, which could include income unlawfully received by the infringer; and payment by the infringer of a penalty established through judicial or arbitral proceedings in the amount of 5,000 to 50,000 times the amount of minimal monthly compensation for use of the copyrighted item as established by law.⁴¹² Illegal copies of copyrightable material may be confiscated according to a judicial or arbitral ruling.⁴¹³ Violations of the Law on Copyright and Neighboring Rights are also punishable by a judicially or arbitrarily imposed fine in the amount of ten percent of the sum awarded by the judge or arbitrator in favor of the plaintiff, and such a fine would be in addition to the remedies described above.⁴¹⁴ This fine is paid into the Republican budget of the Russian Federation.⁴¹⁵

4. *Good Copyright Laws Badly Enforced.* The new Law on Copyright and Neighboring Rights contains the protections necessary to prevent piracy and provides adequate criminal and

408. See *id.* (citing the Law on Copyright and Neighboring Rights at Art. 39(1)).

409. Vermeer, *supra* note 393, at 165.

410. See Mannick, *supra* note 382, at 22.

411. See *id.*

412. See *id.*

413. See *id.*

414. See *id.* at 23.

415. See *id.*

civil remedies to deter intellectual property piracy. Nevertheless, piracy is rampant in Russia. This may be due to the failure of procurators to bring criminal complaints, the failure by the Russian courts to impose criminal sanctions, the reluctance by parties to pursue civil remedies, and the general lack of familiarity with civil remedies. Civil actions in Russian courts are increasing slowly. Even if Russians were to become more respectful of the judicial system, there is a general absence of effective mechanisms in Russia for the enforcement of civil judgments. Moreover, civil plaintiffs may be fearful of reprisals by local officials engaging in piracy or by Mafiosi.

Despite the general failure of the new Law on Copyright and Neighboring Rights to prevent piracy, there are both domestic and international beneficial effects of the new law. The domestic effects of this law include increased certainty of ownership rights in computer programs and databases; increased autonomy of authors who can contract freely with publishers in the West; increased creativity among members of the scientific community; and reduction of the Russian brain-drain phenomenon which is depleting Russia of its most significant talent.⁴¹⁶ The international effects of this law are numerous. Since its increased protection positioned Russia for accession to the Berne Convention, Russia, now a Berne convention member nation, is able to enter the international trade arena with more than one hundred other member nations.⁴¹⁷

E. United States-Russia Trade Agreement Affecting Copyright

In response to the United States Copyright Office's numerous concerns about Soviet copyright law protection, a trade agreement was signed by President Mikhail Gorbachev and President Bush in June 1990 (1990 Trade Agreement).⁴¹⁸ The United States Copyright Office identified Russia's "failure to protect computer programs and databases adequately under copyright law; the failure to protect sound recordings adequately; incomplete public performance rights; overly broad fair use and personal use exemptions; and inadequate enforcement mechanisms generally."⁴¹⁹ The 1990 Trade Agreement granted Most

416. Vermeer, *supra* note 393, at 168.

417. *See id.* at 169.

418. Fleishman, *supra* note 312, at 214.

419. *See id.* at n.156 (citing the House Judiciary Subcommittee on Intellectual Property and Judicial Administration, May 17, 1991 (statement of Ralph Oman, Register of Copyrights and Associate Librarian of Congress), reprinted in [Developments 1987-1991 Transfer Binder] COPYRIGHT L. REP. (CCH) Section 20,638).

Favored Nation status to the Soviet Union⁴²⁰ and obligated it to sign the Berne Convention.

However, in accordance with the Jackson-Vanik Amendment of 1974,⁴²¹ which focuses on the emigration policies of exporting countries, President Bush refused to send the 1990 Trade Agreement to be ratified by Congress until Moscow agreed to enact less restrictive emigration laws, which it did in May 1991.⁴²² President Bush further held up Congressional action until Soviet officials agreed to enact stricter intellectual property legislation, due to pressure exerted by the Motion Picture Association of America (MPAA) which objected to Russia's long history of pirating US films.⁴²³ Under the direction of Jack Valenti,⁴²⁴ the MPAA instituted a film embargo against the Soviet Union in June 1991 in response to its violations of a 1988 Film Agreement. The MPAA lobbied effectively to delay ratification of the 1990 Trade Agreement because the MPAA reported losses to foreign pirates of \$1.2 billion a year.⁴²⁵

In response to the 1990 Trade Agreement and delays in its ratification by the United States in January 1992, the Supreme Soviet acted swiftly, after the December 1, 1991 revolution that caused the demise of communism, to enact changes to the Fundamental Principles of Civil Legislation which are now superseded by the 1993 Copyright Law. These changes in the Fundamental Principles of Civil Legislation would allow the former Soviet Union to join the Berne Convention. Thus, Article 135, section 2 of the Fundamental Principles of Civil Legislation provided that the author had a right to authorship, the right to a name, and the right to the integrity of the work.⁴²⁶ Moreover, Article 135, section 6 provided that the author's heirs could inherit the right to protect the integrity of the work.⁴²⁷ Finally, the author's rights of integrity and of authorship were protected "indefinitely" under Article 137, section 3.⁴²⁸ These provisions

420. See *id.* at 189 n.2 (citing the United States-Soviet Union Agreement on Trade Relations, reprinted in [Developments 1987-1991 Transfer Binder] COPYRIGHT L. REP. (CCH) Section 20,650).

421. Jackson-Vanik Amendment of 1974 § 402(a), 19 U.S.C. § 2432 (1994).

422. Fleishman, *supra* note 312, at 215.

423. See *id.* at 218.

424. See *id.* at 214.

425. See *id.* at 218.

426. Karakis, *supra* note 313, at n.176 (citing the Fundamentals of Civil Legislation of the U.S.S.R., Ch. IV. Fundamentals of Copyright Law of 1961, as amended May 31, 1991, Art. 135(2)).

427. See *id.* at 135.

428. See *id.*

brought the Soviet moral rights protection within the minimum requirements that may be observed by all Berne member countries.

As a result of the ratification of the 1990 Trade Agreement in 1992, five new intellectual property laws have been enacted in Russia since October 1992 which have brought Russian intellectual property protection into line with international standards.⁴²⁹ These five laws are the Patent Law of the Russian Federation, enacted October 14, 1992;⁴³⁰ the Law of the Russian Federation on Trademarks, Service Marks, and Designations of Place of Origin of Goods, enacted October 17, 1992;⁴³¹ Law of the Russian Federation on the Legal Protection of Computer Programs and Data Bases, enacted October 20, 1992;⁴³² Law of the Russian Federation on the Legal Protection of the Topology of Integrated Micro-Circuits, enacted October 20, 1992;⁴³³ and the most recent Law on Copyright and Neighboring Rights, enacted July 9, 1993.⁴³⁴ The trademark law, the software/database law, and the micro-circuit topology law are highly satisfactory, but the patent law leaves certain matters of patent administration and employer-employee rights to be decided by future legislation.⁴³⁵

F. *Piracy of Intellectual Property in Russia*

Piracy and the illegal copying of software have become a widespread, socially acceptable practice in Russia.⁴³⁶ The International Intellectual Property Association reported that Russia's estimated piracy levels for home videos, business software, and entertainment software all exceed ninety percent, and only one-tenth of the products sold in the Russian market are legiti-

429. Maggs, *supra* note 362, at 1.

430. *See id.* at 12 (citing the Russian Patent Law of Sept. 23, 1992, Ross. Gazeta, 14 Oct., 1992). *See also supra* text accompanying notes 370-381 (discussing Russian patent laws).

431. *See id.* (citing the Law on Trademarks, Service Marks and Designations of Place of Origin of Goods, of Sept. 23, 1992, Ross. Gazeta, 17 Oct., 1992). *See also supra* text accompanying notes 362-369 discussing Russian trademark laws.

432. *See id.* (citing the Law on the Legal Protection of Computer Programs and Data Bases, of Sept. 23, 1992, Ross. Gazeta, 20 Oct., 1992). *See also supra* text accompanying notes 382-417 discussing Russian copyright laws.

433. *See id.* (citing the Law on the Legal Protection of the Topology of Integrated Micro-Circuits, of Sept. 23, 1992, Ross. Gazeta, 21 Oct., 1992).

434. Vermeer, *supra* note 393, at n.108 (citing the Law on Copyright and Neighboring Rights, RF Supreme Soviet Decree No. 5351/1-1).

435. Maggs, *supra* note 362, at 1.

436. Vermeer, *supra* note 393, at 169.

mate.⁴³⁷ The ease with which software can be pirated without detection, and Russia's long history of acceptance of piracy coupled with the people's inculcated fear of the ownership of property, make the elimination of piracy a challenging task. Piracy has reached epidemic proportions in Russia, and pirated copies still comprise over ninety percent of the software market in Russia.⁴³⁸

Even though the new laws provide stiffer penalties for infringement of intellectual property laws, eradication of piracy will require more than a legislative mandate.⁴³⁹ Some companies have resorted to selling their products at lower prices to encourage users to purchase legitimate copies of the programs and to allow dealers to expand.⁴⁴⁰ Other companies combat piracy by selling the programs in rubles and marketing a new local language version on a regular basis.⁴⁴¹

As in China where government officials and state-run agencies are reportedly engaged in pirating, the main culprits in Russia are not individuals or black market dealers but rather government enterprises and state-run agencies.⁴⁴² This explains why many members of the legislative and executive branches opposed the new copyright legislation because of its anti-piracy mechanisms.⁴⁴³

G. *Russian Anti-Piracy Laws*

To counter the practice of government piracy of intellectual property, President Yeltsin ordered the Presidential Council and State Duma to use only licensed programs. Corporations are also attempting to comply with anti-piracy laws. GAZPROM, a major Russian oil company, recently purchased over \$500,000 worth of software.⁴⁴⁴

The anti-piracy effects of the new laws are mixed. According to Microsoft, legitimate sales have increased by one thousand percent between July 1993 and June 1994, and the software market is growing at a rapid pace.⁴⁴⁵ Microsoft's managing director in Moscow called Russia the "superpower of piracy," but he

437. \$14 Billion, *supra* note 242, at 94.

438. Vermeer, *supra* note 393, at 169-70.

439. *See id.* at 169.

440. *See id.* at 171.

441. *See id.*

442. *See id.* at 170.

443. *See id.*

444. *See id.* at 170-171.

445. *See id.* at 171.

is confident that the piracy situation is getting much better.⁴⁴⁶

But Microsoft's success story may be the exception rather than the rule. Widespread piracy which prompted the new legislation has not significantly abated.

H. *United States' Attempts to Combat Piracy in Russia*

The International Intellectual Property Association (IIPA) recommended placing Russia on the 1995 Priority Watch List of countries with inadequate copyright protection. This status, which ironically elevated Russia from its pre-reform position on the Watch List, indicates that copyright violations in Russia are worse, despite the passage of the new laws.⁴⁴⁷

USTR Charlene Barshefsky announced on December 20, 1996 that Russia would remain on the USTR's "Watch List" of countries being monitored for failing to give adequate protection to American intellectual property.⁴⁴⁸ However, in 1997 the administration actually decided to place Russia on the "Priority Watch List" because of serious problems including insufficient progress in improving copyright protection and enforcement. The USTR recognizes that Russia continues to address American intellectual property concerns and to fulfill its obligations under the 1992 U.S.-Russia Bilateral Trade Agreement. Barshefsky reported that a New Criminal Code would take effect in Russia in January 1997 which will increase criminal penalties for intellectual property violations. She claims that Russia denies copyright protection to pre-1995 foreign sound recordings and other copyrighted foreign works produced prior to 1973, and Russia has not addressed discriminatory market access barriers to American works. For these reasons Russia will remain on the priority watch list in 1997.

Despite criminal sanctions, which are mentioned but not specified in the new Russian intellectual property laws, the IIPA based its recommendation to keep Russia on the priority watch list on the fact that Russia had not yet criminalized intellectual property rights infringement, and Russian enforcement efforts have been weak. For that reason, the IIPA requested the USTR to withdraw Russia's preferential trade status with the United States until copyright enforcement improves.⁴⁴⁹ On June 13,

446. *See id.*

447. *See id.* at 172.

448. 448 USTR Says Russia, Saudi Arabia Will Remain on IP 'Watch List', 11 World Intell. Prop. Rep. (BNA) 37, at 52 (Feb. 1997).

449. Vermeer, *supra* note 393, at 172.

1996, Russia's New Criminal Code was signed and subsequently took effect on January 1, 1997, providing stiffer penalties for violations of intellectual property rights.⁴⁵⁰

I. *United States Trade with Russia*

Russia and the countries of the CIS are encountering difficult problems in the transition period following the breakup of the Soviet Union, and these difficulties naturally affect trade with the United States. For example, although the economic situation in the Ukraine is unfavorable, foreign investors are nonetheless attracted to certain sectors of the Ukrainian economy.⁴⁵¹ In 1996, elections confirmed Russia's forward direction and numerous Russian companies became interested in entering American capital markets.⁴⁵² For example, increased activity in the issuance of American Depositary Receipts for the purchase of stock in Russian companies is a positive sign of an increase in trade.⁴⁵³ Foreign investment in Russia continues to grow despite political uncertainty, the fluidity of its legal framework,⁴⁵⁴ and the many hidden deterrents to trade such as corruption, graft, the non-convertibility of the ruble, the failure to bring Russian accounting practices up to internationally accepted standards, and the numerous approvals and bureaucratic snags which are vestiges of the communist system decreasing substantially since 1991 but which have not yet totally disappeared.⁴⁵⁵

The countries of the post-Soviet world have the difficult task of integrating their economies into the global market. Since 1991, when the Soviet Union formally dissolved, these new independent countries uncoupled special trade links of their economies and eliminated subsidies to outmoded industrial outfits, which triggered a debt crisis.⁴⁵⁶ These nations radically altered

450. See *Development in Intellectual Property Rights*, 11 World Intell. Prop. Rep. (BNA) 181, at 216 (June 1997).

451. Alex Frishberg, *Investment in Gas and Oil Industry: Ukrainian Legislation and Practice*, S.E.E.L., Dec. 1996, at 1.

452. John T. Connor, Jr., *Russian ADRs in U.S. Capital Markets*, S.E.E.L., July/Aug. 1996, at 10.

453. See *id.* at 11-13.

454. Van Z. Krikorian, *Special Considerations in CIS Power Projects*, S.E.E.L., Dec. 1996, at 4-6.

455. See Tiefenbrun, *supra* note 27 (discussing the many factors affecting joint venture transactions between U.S. and Russian partners). See also Marina T. Charles, *The Art of the Russian Deal (More Braque than Botticelli)*, S.E.E.L., Nov. 1996, at 1.

456. Shirley Goldstein & Mary Holland, *The Summer of '96: Law Reform in Russia*, S.E.E.L., July/Aug. 1996, at 1.

their legal systems in order to establish a "culture of legality."⁴⁵⁷ Despite the odds, important strides have been made in Russia in the past five years to develop a commercial legal system in consonance with global economic practices.

The adequacy of intellectual property legislation and the effective enforcement of these laws have a serious effect on foreign investments and trade with Russia. For example, if intellectual property (claimed to be owned by a Russian partner) is classified as "secret," and rights to all the intellectual property are protected only by an author's certificates, the intellectual property may fall into the public domain once it is declassified.⁴⁵⁸

The high risk due to political volatility, the fluidity of the legal climate, and the practice of intellectual property piracy continue to place a damper on trade between the United States and Russia. Nevertheless, steel imports from Russia have increased markedly.⁴⁵⁹ In the course of an official Kremlin press conference, Anatoly Kruglov said that Russia's foreign trade had more than doubled. At the same time coffers are largely empty.⁴⁶⁰ Trade turnover in 1996 was 39 billion rubles. In 1997, within two months Russia had an increase of 6.7 billion rubles or \$1.7 billion dollars as compared to the corresponding period the previous year. Russia does 4.9% of its trade with the United States.⁴⁶¹ Russia's exports increased 9.1% in January and February, although Russian trade with CIS countries has decreased.

According to President Clinton at the most recent summit meeting in Helsinki, both Russia and the United States must solve problems of reciprocal trade. Both must take steps to increase access to each other's markets, and the United States should grant Russia MFN trading status.⁴⁶²

According to reports, Russian exports to the United States are \$442 million or 2.5% of total Russian exports. This is a little more than the rate of Russian exports to the United Kingdom. American imports to Russia are \$1857 million or 8.4% of total American exports. This is just a little more than the rate of American exports to Austria.⁴⁶³

457. See *id.*

458. Charles, *supra* note 455, at 1.

459. Thomas W. Gerdel, *Reborn Steel Industry*, BUSINESS, May 28, 1997, at 1.

460. *Official Kremlin International News Broadcast*, (Apr. 11, 1997).

461. See *id.*

462. *Current Digest of the Post-Soviet Press*, Apr. 23, 1997, at 3.

463. BARCLAYS BANK COUNTRY REPORT, May 1997, at 1.

III. POSSIBLE SOLUTIONS TO PIRACY IN RUSSIA AND IN CHINA

In China, despite a recent Asian financial crisis, and Russia intellectual property laws, old and new, abound, but piracy prevails and remains an impediment to international trade with the United States. The adequacy of the intellectual property laws is not the problem. The failure to enforce the laws, the general lack of respect for the judicial system, and the public misunderstanding and intrinsic fear of the concept of ownership of intellectual property are the underlying causes for the failure to eradicate or effectively reduce piracy.

In China, the economy is booming and the new intellectual property laws are plentiful and protective, reflecting Western pressures set forth in the 1979, 1992 and 1995 trade agreements which made Chinese accession to major international intellectual property conventions possible. Since its adoption of a comprehensive trademark law in 1982, China has become a player in the international arena of technology transfers. China joined the Paris Convention for Protection of Industrial Property in 1985 and the Madrid Agreement for International Registration of Trademarks in 1989. In response to the 1979 Trade Agreement, China adopted a cohesive patent law system in 1984, and joined international agreements and institutions such as WIPO in 1980 and the Patent Cooperation Treaty in 1992. The 1979 Trade Agreement spurred many domestic Chinese copyright laws in the 1980s, but it was not until the 1990s, in response to the 1992 MOU, that a National Bureau of Copyright was established and a new more protective Copyright Law was adopted. Two years later registration of computer software programs was legalized in China. China joined the Berne Convention in 1992, the Universal Copyright Convention in 1992, and the Geneva Convention in 1993.

In Russia, old Soviet intellectual property laws reflected socialist ideology and legitimized the government's free use of copyrights. These laws supported the establishment of censorship by the prevalent Socialist User Organization system (which was countered by *samizdat*) and by the creation of the VAAP which prevented publication of dissident works and was replaced first by RAIS and after 1990 by the RAO. These antiquated intellectual property laws were repealed after 1992, and new intellectual property laws, drafted in response to the 1990 U.S.-U.S.S.R. Trade Agreement, were adopted. The new patent law, adopted in 1992, is a blend of American and European patent law. The new trademark law, adopted in 1992, the new computer program and database law, adopted in 1992, and the new

law on microcircuits also adopted in 1992 are protective. The new copyright law adopted in July 1993 was so protective that it finally positioned Russia to join the Berne Convention, which it subsequently did in 1995.

One wonders why piracy persists in Russia and in China if their intellectual property laws conform to international standards of protection.⁴⁶⁴ While criminal and civil penalties exist, failure to enforce them does not provide the legal systems of China and Russia with sufficient incentives to deter piracy. Enforcement of these laws in both Russia and China is weak because judges, attorneys, police and the people at large are ill-informed about the meaning of ownership of property. Ownership was considered an evil according to communist ideology. To obtain goods that were scarce, the person who successfully resorted to stealing, bribery, corrupt tactics, and a complex system of favors was considered clever, perhaps even heroic, because he was beating the system. Moreover, government officials unevenly engage in piracy because reproducing someone else's CD or copying someone's video is not perceived as an illegal act. Therefore, raising public awareness of the illegality of piracy, training the legal enforcement agents in the meaning of ownership of intellectual property rights, and establishing an effective enforcement mechanism must begin at once.

Lawyers and judges are basically in the dark when it comes to the enforcement of intellectual property laws in China and Russia. Legal precedents and case law do not exist for the prosecution of copyright infringement of computer software.⁴⁶⁵ Judges may have difficulty determining the status of pre-existing works or applying copyright law to technical computer programs and databases. In fact, the International Intellectual Property Association has agreed to conduct enforcement seminars through the Russian Ministry of Justice for officials who administer the new copyright laws.⁴⁶⁶

The Russian and Chinese people are generally skeptical about the honesty and effectiveness of their respective judicial systems. People in both these countries are accustomed to function according to a corrupt system of favors which may still be prevalent in the court system. Fear of reprisals by government officials and Mafiosi discourage people from obtaining redress of their intellectual property grievances through the court system,

464. Rosalind M. Parker, *Protecting American Television Programming in Russia, China, Taiwan and Japan*, 17 HASTINGS COMM. & ENT. L.J. 445 (1995).

465. Vermeer, *supra* note 393, at 173.

466. See *id.*

and foreign partners are even more discouraged from using the Chinese and Russian court systems to obtain their rights. Severe penalties and public embarrassment of government officials who engage in piracy should be instituted in order to address the causes of poor implementation of intellectual property legislation. Presently, neither the Russian nor the Chinese government has any economic incentive to prosecute infringement cases since the costs of enforcement outweigh the money collected in fines. Thought must be given to reducing legal costs in these countries.

In fact, the economic issue is at the crux of the solution. If people can be made to understand and believe that there are adverse effects on the economy stemming from the use of pirated products, this realization may act as a deterrent. Russian and Chinese firms engaging in piracy of software run the risk of using virus-infected or corrupted copies which may detrimentally affect the economic return on their investment.

To combat piracy and effectively implement the intellectual property laws in both China and Russia, the following measures should be considered as possible policy plans: (1) the institution of compliance monitoring of procedural and substantive obligations provided in the domestic and international intellectual property laws; (2) the establishment of incentives to compliance such as training programs, industrial programs, and technical assistance programs; (3) the continuance of trade sanctions in the event of non-compliance; (4) the accession of China and Russia to the WTO not as Less Developed Countries but on condition that immediate compliance of the TRIPS agreement be satisfied for accession; and (5) the continuance of conditioned MFN renewal until accession to the WTO occurs.

The continued threat to refuse China's entry into the WTO may do more harm than good in stopping piracy. China's entry into the WTO requires its strict adherence to TRIPS at least after five years following its entry, if China succeeds in classifying itself as a less developed country. China's failure to comply with TRIPS would result in the implementation of a promisingly effective and globally administered Dispute Resolution Mechanism which is likely to deter piracy. The accession of China and Russia into the WTO should be reconsidered, feared less by the United States, and desired more if we want to zealously pursue the admirable goals of the WTO to promote free trade and economic advantage globally.

